

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
 FOR THE COUNTY OF YAVAPAI

2011 DEC -6 AM 9:57

SANDRA K HARKHAM, CLERK

BY: Jacqueline Harshman

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

Case No. V1300CR201080049

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
 BEFORE THE HONORABLE WARREN R. DARROW

TRIAL DAY FIFTY-SIX

JUNE 15, 2011

Camp Verde, Arizona

**ORIGINAL**

REPORTED BY  
 MINA G. HUNT  
 AZ CR NO. 50619  
 CA CSR NO. 8335

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 FOR THE COUNTY OF YAVAPAI  
3  
4 STATE OF ARIZONA, )  
5 Plaintiff, )  
6 vs ) Case No. V1300CR201080049  
7 JAMES ARTHUR RAY, )  
8 Defendant )  
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1 I N D E X

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3 EXHIBITS ADMITTED  
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5 1018, 1019, 1020 139  
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1 APPEARANCES OF COUNSEL: 2

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1 Proceedings had before the Honorable  
2 WARREN R. DARROW, Judge, taken on Wednesday,  
3 June 15, 2011, at Yavapai County Superior Court,  
4 Division Pro Tem B, 2840 North Commonwealth Drive,  
5 Camp Verde, Arizona, before Mina G. Hunt, Certified  
6 Reporter within and for the State of Arizona.  
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## PROCEEDINGS

(Proceedings continued outside presence of jury.)

THE COURT: The record will show the presence of Mr. Ray, Mr. Kelly, Ms. Do, and Mr. Li. State's represented by Ms. Polk and Mr. Hughes.

We need to discuss the -- some more on the instructions. We knew there'd be some additional discussion, and I have a set that I believe is pretty close to final.

First thing I wanted to address is the verdict form. And I didn't want people to be confused to suggest that that was anything other than to show you a different format than what I've used and I think the other judges have used for lesser-included offenses. I'd like to do that first because Diane can be -- you know -- fixing it or doing the other verdict forms if it's approved.

This is the language from the supplemental jury instructions, the 2010 supplement. And I think the legal purpose is this, that it would possibly eliminate -- you know -- looking down the line, a retrial on an -- on an offense if there was a finding -- a unanimous finding regarding the offense. I believe that's

the purpose of it. This is why it's suggested.

Obviously, I just wanted to get you the form right away before I did this so that you could see what the concept was. Because I don't think anyone is familiar with that.

But, Mr. Hughes, do you have the actual proposed form now?

MR. HUGHES: We do, Your Honor. The state has no objection and believe it's appropriate.

THE COURT: Mr. Kelly?

MR. KELLY: Judge, I -- I believe this form is the preferable form given, this in comparison to what you submitted yesterday. And this is what I've used in the past.

The only thing I would suggest, Judge, in regards to a modification on page 2, I believe out of consistency it should read not guilty, guilty, unable to agree, consistent with the manslaughter verdict.

THE COURT: And I took that out because if you look at the form for the final offense, and what -- what they give you in the form is the whole range of homicide. The final one they leave that out, because I think that if the jury comes back and they just say we're -- we're hung. We can't

proceed any further.

So the form leaves it out, Mr. Kelly.

And I --

MR. KELLY: I see that.

THE COURT: -- and I think -- you know -- but I don't really have to -- I don't think it makes a difference if the parties have a preference.

I also add that the above is the unanimous finding of the jury. I think it's always good to have it clear that it has to be a unanimous finding.

Mr. Hughes, what about putting that -- that box in? I don't have any preference.

MR. HUGHES: Your Honor, I don't believe the final box would be necessary. I think the -- the RAJI supplemental form, a great deal of thought went into it. And clearly in the very last one, the ultimate lowest possible or lesser-included, it was not included. I don't believe it should be included in this one either. At that point you would have a hung jury, as the Court mentioned. And there's other procedures for dealing with that.

THE COURT: I think if -- what you get into then -- that eventually you get into the situation of the extra instruction and all that. So I'm

going to go with the RAJI form and -- as it is.

Mr. Kelly, anything else on the verdict form?

MR. KELLY: Your Honor, just to make the record, I believe our concern is that in the interest of clarity to the jury, we could possibly with the current form result in an erroneous verdict because there may be individuals on the jury who believe that there was sufficient evidence for one crime but not the other and then are misdirected by this particular form. They -- they should be able to find the person not guilty of negligent homicide but guilty of manslaughter.

I'm looking to -- 6(a) says, you find the defendant not guilty of manslaughter or after full and careful consideration of the facts, you cannot agree.

THE COURT: So the first part covers how they get to the lesser-included and -- and gives them the instruction. If they find not guilty -- and again, I think that's in there for double-jeopardy purposes ultimately. And if they don't think they agree and then they move on and they have not guilty and guilty, and then I understand the defense has suggested just give them that box so

1 that they can say, well, now we can see that if we  
2 find the first time through we are unable to, we  
3 can just do that. And I think that would be  
4 misleading for the process. And I think that's why  
5 the form leaves it out.

6 MR. KELLY: We've made our record. Thank you,  
7 Judge.

8 THE COURT: Okay.

9 Heidi, take that.

10 I wanted to verify. Is there going to be  
11 any further evidence offered by either -- either  
12 party?

13 From the defense, Mr. Li?

14 MR. LI: No, Your Honor.

15 THE COURT: Okay. So the defense will rest.

16 Any rebuttal, then, Ms. Polk?

17 MS. POLK: There will not be rebuttal,  
18 Your Honor. But we do have the three client files  
19 still --

20 THE COURT: And I'm getting to that too.  
21 Okay. So there's that. And then the next thing to  
22 do is the mechanism for the three remaining  
23 exhibits. And I want to discuss that.

24 So is there an agreement finally on that  
25 as to redaction?

1 MS. POLK: Your Honor, unfortunately there is  
2 not. The state had redacted it. We believe it's  
3 in compliance with what the Court has ordered. I  
4 had sent it to the defense, but they've indicated  
5 that they believe that they should be further  
6 redacted. What I'd like to do is submit --

7 THE COURT: I'll just ask Ms. Rybar to bring  
8 that up to me, please.

9 MS. POLK: These are not marked yet because,  
10 as the Court had indicated, we'd be able to  
11 substitute them for the Exhibits 1018, 1019, and  
12 1020.

13 THE COURT: Just looking at -- at the -- the  
14 first one. Again, I don't know what the sequence  
15 will be, but perhaps the -- the concern is  
16 scribbling on it? Something?

17 Mr. Kelly, these are the records that  
18 relate to James Shore. What -- what's the  
19 objection with that -- the proposed exhibit?

20 MR. KELLY: Judge, I believe Ms. Seifter has  
21 submitted our proposed redacted versions. Do you  
22 have a copy or do you need a copy?

23 THE COURT: Were they brought -- where were  
24 they submitted at? I don't have one right here.

25 MS. SEIFTER: I believe, Your Honor, they were

1 not submitted to the Court. I can disclose that  
2 this is what we sent to the state as our proposal.

3 THE COURT: Okay. Thank you.

4 One thing. The state's copies are much  
5 more legible. I can -- I can barely read a lot of  
6 the -- the copies that have been submitted by the  
7 defense. And -- you know -- Counsel, this has been  
8 going on for how long?

9 To look strictly at my ruling, looking at  
10 the records for Liz Neuman, it just has more  
11 information than the -- than what I had indicated.  
12 Descriptions of a 2007 event, again, just the  
13 description.

14 MS. POLK: Your Honor, the state understood  
15 that we could have descriptions of the events.

16 THE COURT: No. Some of them redacted. I  
17 said the name of the event and where it was located  
18 and the date. I thought that was all -- that was  
19 all appropriate. And that's what I recall stating.

20 MR. KELLY: Judge, I agree. And again, I --  
21 we submit the issue to the Court, but we believe  
22 our redacted copies are in compliance with the  
23 prior Court orders.

24 THE COURT: Have you seen these, Ms. Polk?  
25 Mr. Hughes?

1 MS. POLK: Your Honor, I have seen them. The  
2 copies we got were not very legible either, but  
3 what -- what I understood the Court to say is that  
4 the name of the event, the description of what the  
5 event was --

6 THE COURT: I didn't. I said the name of the  
7 event, the time, and the date and the location. I  
8 thought that all was pertinent. So I -- I would  
9 admit with the defense, but the -- I'm concerned  
10 about the legibility. So --

11 MR. KELLY: May I have a second?

12 THE COURT: Yes.

13 MS. POLK: Your Honor, on James Shore, the  
14 copy by James Shore does not even indicate how much  
15 he paid. You can look at the state's exhibit,  
16 the -- Mr. Shore had credit from another event.  
17 And what the defense has submitted makes it look  
18 like all he paid was 7,794. What they took out on  
19 page 2 is the information about another event and  
20 why he had credit because, in fact, he did pay just  
21 short of \$10,000.

22 MR. KELLY: Judge --

23 MS. POLK: And I -- I would submit that the  
24 James -- I don't have my exhibit in front of me,  
25 Your Honor, but I believe the state's exhibits for

1 James Shore would comply with.

2 MR. KELLY: Again, Judge, consistent with your  
3 order, we'll stipulate to the dollar amounts.  
4 We'll stipulate to the names of the seminars  
5 attended, the date, and the individual's name.

6 The problem with those copies is we're in  
7 a very small room with very limited equipment, and  
8 we're running low on toner, so I think we can make  
9 better copies. And I think that we understand and  
10 have understood your ruling and will make a copy  
11 consistent with your ruling.

12 THE COURT: With regard to what Ms. Polk says,  
13 I think as to James Shore, I think it complies.  
14 Yours aren't gathered yet. They're in a stack. I  
15 think James Shore does comply. I'd like you to  
16 look at that, Mr. Kelly.

17 MS. POLK: Your Honor, I believe there was no  
18 disagreement between the parties for the state's  
19 exhibit on Kirby Brown.

20 THE COURT: Okay.

21 MS. POLK: And I think it's just the Liz  
22 Neuman exhibit that there's a disagreement.

23 MS. SEIFTER: There was actually a minor  
24 change that we made to the Kirby Brown.

25 THE COURT: Ms. Seifter, what about the

1 records for Kirby Brown?

2 MS. SEIFTER: Your Honor, if I can just  
3 address the point on James Shore --

4 THE COURT: Sure.

5 MS. SEIFTER: Our concern was that the -- what  
6 the state submitted to us if -- I think we're  
7 looking at the right page, has the -- half of the  
8 \$15,000 amount has handwritten notes indicating  
9 that the -- the amounts that are not the \$7,000  
10 check were actually other events attended by his  
11 wife, Alyssa Gillespie. Indicates here 21st  
12 Century Alchemy and Practical Mysticism on other  
13 dates.

14 So that -- that was why we asked that  
15 those be redacted and that the check signed by  
16 Mr. Shore be the amount that is reflected. That  
17 was the reason.

18 THE COURT: The first name is on there, I  
19 guess. And that -- and I did bring that up because  
20 I saw that and I didn't know -- I suspected that  
21 was the objection. I thought just because it might  
22 be uncertain as to what that's about, but that --  
23 that would -- that would be misleading if it  
24 doesn't apply to Mr. Shore.

25 MS. POLK: Your Honor, my --

1 THE COURT: Go ahead, Ms. Polk. Talk to your  
2 assistant.

3 MS. POLK: Your Honor, if I may approach.  
4 I think I gave you the -- this would be the one  
5 that still reflects the -- the problem is that  
6 there is credit. And so either the records are  
7 going to reflect 15,000, which is more than  
8 Mr. Shore paid, or 7,000, which is less than he  
9 paid, because there was -- they signed up together.

10 MR. KELLY: Again, Judge, we'll stipulate to  
11 the amount that Mr. Shore paid if someone knows  
12 what that actual amount is.

13 THE COURT: Okay. And if that -- if that --  
14 if you can arrive at the exact -- actual amount,  
15 then that can just be -- just be indicated. Total  
16 amount paid for events, a line like that -- you  
17 know -- with the other pertinent event listed.

18 And I guess with regard to Kirby Brown,  
19 that's agreed. Is that correct?

20 MS. SEIFTER: We made a very minor change,  
21 which I don't think will be objectionable. On the  
22 second page of the exhibit, which is where the  
23 amount is listed, there's a little sort of a black  
24 bar at the top that says, single experiences and  
25 investment and that kind of language, which we

1 understood the Court's ruling was events attended  
2 and amounts paid. But without that bar it has the  
3 name of the event and the amount paid. And the  
4 other language seemed to be sort of extraneous  
5 marketing type of language.

6 THE COURT: Okay. Well, I want to hear  
7 Ms. Polk. Again, I'm trying to just stick with the  
8 ruling I made now and not refine it any further.

9 But anything on that?

10 MS. POLK: Your Honor, I don't actually have  
11 my copy in front of me anymore.

12 THE COURT: It's just this bar across the top  
13 that has a couple of descriptions. That's all.

14 MS. POLK: Your Honor, that -- that -- I would  
15 submit that's innocuous. The Court should accept  
16 the state's.

17 THE COURT: And I understand that since I made  
18 the ruling a while ago, I'm going to stick with the  
19 ruling, and that can be redacted by the defense.  
20 However, this will do. And I'm just saying in  
21 terms of work load, it is minor. That was the  
22 ruling. Okay.

23 And what about Liz Neuman?

24 MS. POLK: Your Honor, the state,  
25 understanding the Court's ruling, will need to do

1 some further redaction. I think we'll have to work  
2 off of -- unless -- I don't know if the defense can  
3 give us better copies, but what we have is not very  
4 legible.

5 MR. KELLY: I think if we can find a better  
6 copy, we can get a better copy.

7 THE COURT: Heidi, assist me again.  
8 Redistribute those to the parties, please.

9 With regard to instructions, I just  
10 wanted to make -- make some comment about some of  
11 the ones that were more disputed, I guess.

12 One instruction had to do with the  
13 superseding, intervening cause issue. And  
14 Mr. Hughes discussed the Slover case. And I think  
15 my remark about the posture wasn't really helpful  
16 to the -- to the issue. I remember toward the end  
17 I -- I said that came up with the defense saying we  
18 should have had the superseding, intervening cause  
19 instruction and didn't. And I -- I don't know that  
20 that's really helpful to the -- to assess that.  
21 That was a statement I made.

22 I think what is helpful is this, that in  
23 that case, as Mr. Li had noted, it involves an area  
24 of law that has extensive authority that -- that  
25 deals with that. And the Court in that case --

1 first the trial judge and then later the court of  
2 appeals, essentially, took the issue of  
3 superseding, intervening cause away from the jury  
4 as a matter of law. They just said -- you know --  
5 that didn't need to go to the jury because the  
6 facts did not warrant a superseding, intervening  
7 cause instruction in that area of drinking and  
8 driving type cases.

9 This is not the situation. I have found  
10 that there is a basis for the superseding,  
11 intervening cause instruction and that,  
12 essentially, it now all comes within the argument  
13 that can be made with regard to causation,  
14 proximate cause. And it will be a jury question.  
15 I think that's the appropriate way.

16 So, Mr. Hughes, that's my reasoning on  
17 that.

18 MR. HUGHES: Thank you, Your Honor.

19 THE COURT: The other -- the second area has  
20 to -- has to do with duty. And you can see where  
21 I've added some language. And -- and I have to  
22 say, in working on this last night, it was -- it  
23 was awkward to put something in like that because  
24 there seems to be an element -- and the state  
25 expressed this concern -- of invading the province

1 of the jury when you make a pronouncement.

2 And it's Justice Bales who wrote the  
3 Gibson opinion. I went back and looked at that.  
4 And what Justice Bales with the supreme court  
5 really says is that -- and this has been discussed  
6 by both sides. Mr. Li specifically has pointed out  
7 the Gibson case a number of times. But it's the  
8 Court's duty to determine whether there is a duty.  
9 That's the Court's job.

10 And this is a -- obviously a case in the  
11 criminal justice system. The Gibson case was not  
12 in the criminal justice system. It was a civil  
13 case. But I can't see anything that really takes  
14 that principal out of the mix.

15 The Supreme Court in Gibson said that  
16 it's the -- the Court's job to decide that if the  
17 normal duty of care that a person owes in general,  
18 the reasonable care to another -- that is just the  
19 general statement of the duty, owing that to  
20 others -- reasonable care not to create the risk of  
21 harm, phrased in different way.

22 It's for the Court to decide, are there  
23 public policy reasons to not have it in a certain  
24 situation, class of cases. And it's decided on  
25 that basis. So although the way I've phrased this

1 instruction -- and it concerns me because it makes  
2 a pronouncement. Here's this general duty that's  
3 owed. And the effect of that, of course, does  
4 permit the jury to consider arguments concerning  
5 omissions or facts as to omission.

6 The reason I think having the Court make  
7 this decision is not consistent with the basic  
8 principles of criminal justice and criminal law is  
9 that the jury still has to find proximate cause.  
10 They have to ultimately determine the issue of  
11 proximate cause.

12 I want -- I just want to make these  
13 statements now, make sure I get them on the record.  
14 We're going to go through the instructions, and you  
15 can be thinking about that and make whatever  
16 additional records you wish.

17 In putting that duty instruction  
18 together, it did make me see why I think the RAJIs  
19 are drafted the way they were and not talk about  
20 conduct. Because I think the RAJIs contemplate the  
21 usual case, the more common case, of an automobile  
22 or firearm type situation where you're dealing with  
23 voluntary act.

24 And so when you're dealing with voluntary  
25 act, the language the way the RAJI is stated, I can

1 see that. When you talk about possible omissions,  
2 though, conduct is helpful because there's an  
3 actual definition that talks about conduct being  
4 voluntary act or omission.

5 And so in that sense I think it does --  
6 it's consistent. Adding -- adding the conduct to  
7 the RAJI language as actually suggested by the  
8 defense is -- makes it more clear. Because conduct  
9 does include both -- both aspects, voluntary act  
10 and omissions.

11 With regard to a basis of a duty -- and  
12 this was mentioned by the defense -- well, if it  
13 rests on contract, there's a problem because who --  
14 who's -- who are the parties to the contract? If  
15 you even try to have some kind of third-party  
16 beneficiary analysis, does that make any sense?

17 I think the way I stated the point at the  
18 ruling on the Rule 20 is this: There -- there's an  
19 element of contract about this, and there may be  
20 other bases as well. And there -- and there is.  
21 The -- fundamentally what's going on here is there  
22 was a contract, apparently between I guess -- that  
23 were proved in some fashion, between JRI and the  
24 alleged victims.

25 And that contract is executed. It --

1 it's brought about -- the results of that contract  
2 are brought about through the actions of Mr. Ray  
3 and the participants, the alleged victims included.

4 And going back to the analysis in the  
5 Gibson case, there's that footnote and the  
6 discussion that the idea finding a specific,  
7 special relationship is eroding. It -- it really  
8 has to do with this general duty that exists not to  
9 create risks of harm and that a court can take it  
10 out of that consideration, can take it out of  
11 province of the -- of the jury.

12 In terms of the -- the basis of the -- of  
13 the duty, I have found it to be just one of the --  
14 the general duty of care, as I've stated.

15 MR. KELLY: Judge, are we going to have the  
16 opportunity to discuss --

17 THE COURT: I want to make sure I say this  
18 because there were a number of items we were trying  
19 to get through, and then we're going through each  
20 page.

21 MR. KELLY: Thank you.

22 THE COURT: So you can be thinking about this.

23 Then the other area that there was a lot  
24 of debate on had to do with the creation-of-peril  
25 instruction. I -- I'm really back to Comment C on

1 that. I found a duty that exists, and there's just  
2 no need to have that additional instruction and  
3 again, as indicated, the complication of  
4 instructing as to what negligence is and when it  
5 would apply and those things.

6 The other thing I wanted to mention had  
7 to do with the original superseding, inter --  
8 intervening cause issue. And it was a concern  
9 that occurred to me about possible burden shifting,  
10 if there was something added to that instruction.  
11 If the state proved negligence, then the question  
12 of intervening cause, superseding cause, is just  
13 foreclosed. That's another reason I didn't think  
14 it was appropriate to follow that suggestion in  
15 Slover about when -- when superseding, intervening  
16 cause would not be appropriate in finding -- once  
17 there's a finding of negligence, again, adding the  
18 necessity of defining "negligence" and, I think,  
19 potentially confusing the jury.

20 So those -- those are the general  
21 comments I wanted to make about some of the more  
22 disputed matters. But in terms of the final  
23 instructions, if you've got those, and I hope  
24 you've had time to read through them. And please  
25 indicate to me if you find any just typographical

1 errors as well. But if we can just start again at  
2 the beginning and go to page 1.

3 Mr. Hughes.

4 MR. HUGHES: No objection to page 1.

5 THE COURT: Mr. Kelly?

6 MR. KELLY: No objection.

7 THE COURT: Page 2?

8 MR. HUGHES: No objection.

9 MR. KELLY: No objection.

10 THE COURT: Page 3?

11 MR. HUGHES: No objection.

12 MR. KELLY: Your Honor, we want to -- on  
13 page 3, in regards to paragraph H, we've argued  
14 this extensively yesterday. We want to make sure  
15 that the record is clear that we are objecting to  
16 paragraph H, absence of another participant.

17 And I'm not sure how you filed -- the  
18 Court filed the various drafts of the jury  
19 instructions.

20 THE COURT: I think you -- you submitted  
21 originals of all your proposed instructions;  
22 correct?

23 MR. KELLY: We have.

24 THE COURT: That's what I would ask that you  
25 do to make sure -- you know -- I'll give you

1 whatever opportunity either side needs, of course.  
2 But you need to have the written instruction  
3 that -- that I would not be --

4 MR. KELLY: My point was in terms of the  
5 record, if someone was reading the record, to be  
6 able to reference the page and paragraph we're  
7 discussing. Each draft may be somewhat different.

8 THE COURT: But you did mention you're  
9 concerned with -- under 3, it would still be  
10 under --

11 MR. KELLY: Three.

12 THE COURT: -- No. 3. And it's currently  
13 page -- or letter H. But it's absence of other  
14 participant. That's what you're addressing right  
15 now?

16 MR. KELLY: Correct. And we argued this  
17 extensively yesterday. We incorporate those  
18 arguments and objections and request that this  
19 particular instruction not be provided to this  
20 jury.

21 THE COURT: And, again, you can incorporate  
22 your argument. But your basic argument on that?

23 MR. KELLY: Judge, first of all, the second  
24 sentence, the defendant's guilt or innocence is not  
25 affected by the fact that another person or persons

1 are not on trial now. There is no evidence that  
2 anyone other than my client was charged with a  
3 crime in this case as a result of the October 8th,  
4 2009, accident.

5 So it begs the question, why would we  
6 risk confusing the jury with something that's  
7 simply not true, that no one else is facing trial?  
8 I have received -- or excuse me. I have used this  
9 instruction in jury trials when there are multiple  
10 defendants tried on different occasions. But I've  
11 never seen it given just when -- when there's no  
12 pending charge and no indication that anyone is  
13 going to be charged. And plus a grant of immunity,  
14 use immunity, to Mr. Rock.

15 So I think it's -- has no basis in fact,  
16 is potentially leading, and potentially prejudicial  
17 to a fair determination of the facts in this case.

18 THE COURT: And just to clear up, you don't  
19 anticipate there will be argument that other people  
20 may be somehow culpable or at fault? You don't  
21 think that would come up in arguments?

22 MR. KELLY: Judge, when we looked at the --  
23 what you've described as a unique case and we're  
24 objecting and discussing extensively this interplay  
25 between civil negligence and criminal

1 responsibility, yes, there is going to be reference  
2 in Mr. Li's closing arguments that other people are  
3 responsible.

4 But it's undoubtedly the only testimony  
5 in this trial and a true fact that no one else has  
6 been charged as a result of anything that occurred  
7 on October 8th, 2009. That's -- that's my point.  
8 But I see those as two different issues, Judge.

9 THE COURT: I'm just wondering if you have  
10 alternative language you might suggest if you think  
11 that's too -- too geared toward --

12 MR. LI: If I can refine what Mr. Kelly said.  
13 This is an accomplice kind of instruction. And I  
14 am going to say, as I said in the opening -- in my  
15 opening statement, that nobody should have been  
16 charged. And that the fact that I might say that  
17 there were other people who might have shared  
18 responsibility, that's not the question of the  
19 criminal statutes that are referenced in this  
20 particular jury instruction. And so that's why the  
21 jury instruction is not necessary.

22 We're not talking about two bank robbers,  
23 one being charged on Tuesday and one being  
24 charged -- or tried on Thursday. It's a very --  
25 you know -- it's very different circumstances. And

1 I will not say that -- that somebody else is a  
2 criminal. That's not part of the argument.

3 MR. HUGHES: Your Honor, that --

4 THE COURT: It wasn't exactly my question.  
5 But I understand what --

6 MR. LI: I'm sorry, Your Honor.

7 THE COURT: No. And it does -- it does  
8 address some of the concerns.

9 Mr. Hughes.

10 MR. HUGHES: The suggestion has been raised to  
11 the jury that other people were responsible for  
12 what happened -- the Mercers or the Hamiltons in  
13 particular, possibly even Fawn Foster, depending on  
14 what the jury may have taken from her examination  
15 as to the use of chemicals around the property.

16 That suggestion is something that will be  
17 in the jurors' minds when they go back to the jury  
18 room, even if it's not argued, although it sounds  
19 like there will be some argument that there were  
20 other people who were responsible, if not blatantly  
21 saying they should be criminally charged.

22 This instruction, which is standard RAJI  
23 criminal No. 12, is an appropriate instruction.  
24 It's supported by the State versus Cannon case, 148  
25 Ariz. 72, a 1985 Arizona Supreme Court case. It's



1 supported by the evidence in this case, and it  
2 should be given.

3 MR. KELLY: Judge, if I could reply very  
4 quickly. Responsibility or culpability in this  
5 case has been -- the factual basis for culpability  
6 of other persons was extensively discussed in front  
7 of the jury that it always related to civil  
8 responsibility. In fact, these people testified  
9 that they were defendants in a lawsuit.

10 But the problem is, if you recall  
11 Mr. Li's opening statement, and the thrust of our  
12 cross-examination is our defense is based on an  
13 inadequate investigation that Detective Diskin and  
14 the State of Arizona looked one way and one way  
15 only. And you've heard that term, and we've argued  
16 it. We've asked witnesses of that.

17 And the true fact is that no one else was  
18 charged with a crime. And Mr. Li has just provided  
19 an avowal that he is not going to argue in his  
20 closing that someone should have been charged with  
21 a crime or has been charged with a crime. So in  
22 terms of any allegation of responsibility, it  
23 relates solely to the civil arena.

24 And again, Judge, there is two bases for  
25 objections. First of all, given that there's no

1 factual basis, no reasonable inference to provide  
2 this. Secondly and more importantly, given the  
3 strategy of our defense, it potentially misleads  
4 the jury and it would be prejudicial to Mr. Ray.

5 MR. HUGHES: Your Honor, the instruction is  
6 not limited to other charged defendants. I never  
7 heard that argument made before. The instruction  
8 clearly says participants, if they may have  
9 participated in the crime. There's been  
10 evidence -- there's been a suggestion that the  
11 Hamiltons or the Mercers may have somehow  
12 participated through the construction of the sweat  
13 lodge or the adding of rocks to the sweat lodge.

14 For those reasons alone the instruction  
15 is clearly supported by the evidence and should be  
16 given.

17 THE COURT: I think the instruction is geared  
18 to keep jurors focused on the evidence here and not  
19 wondering about ideas of fairness or concepts of  
20 fairness.

21 Any -- and further record?

22 MR. KELLY: Judge, if I may just have a  
23 moment.

24 THE COURT: Yes. I suggested to someone to  
25 look at that -- that second sentence. It's

1 something that might be adjusted. I think that's  
2 basically the RAJI.

3 Mr. Hughes.

4 MR. HUGHES: It is.

5 MR. KELLY: It is the RAJI, Judge. And this  
6 is a criminal trial. I believe I've stated  
7 correctly that no one else was charged with a  
8 crime. And given what you've heard throughout the  
9 last four months, perhaps actually clarifying this  
10 instruction consistent with the evidence and the  
11 arguments by adding something like, you may  
12 consider evidence of an inadequate investigation as  
13 to other culpable parties and/or causes if you  
14 find. That's been very --

15 THE COURT: I think that's a matter of  
16 argument if it's supported by the facts. Thank  
17 you. I'm going to leave that instruction in.

18 Anything else on page 4, Counsel?

19 MR. KELLY: Nothing further, Judge.

20 THE COURT: Thank you.

21 Page 4?

22 MR. HUGHES: Your Honor, there -- I believe,  
23 and I missed this yesterday, there's a typo in the  
24 very final paragraph. The first sentence, I  
25 believe, should read, the state must prove the

1 defendant guilty beyond a reasonable doubt.

2 THE COURT: It can be that way or it might  
3 just be, the state must prove guilt beyond a  
4 reasonable doubt. There's an extra "Y."

5 MR. HUGHES: I'm fine with either one.

6 THE COURT: Mr. Kelly, the typo in the --  
7 right under constitutional right not to testify.

8 MR. KELLY: Judge, I agree there's a typo.  
9 However you want to fix it.

10 THE COURT: I'll just cross out the "Y."

11 MR. KELLY: I have no other objections on --  
12 or comments for page 4.

13 THE COURT: Page 5, Mr. Hughes?

14 MR. HUGHES: No objections.

15 THE COURT: Thank you.

16 Anything else on -- anything on 5,  
17 Mr. Kelly? The presumption of innocence, Portillo?

18 MR. KELLY: No objection on page 5 until we  
19 begin paragraph 5 on page 5, which continues on to  
20 page 6.

21 THE COURT: All right.

22 Mr. Hughes, on page 6?

23 MR. HUGHES: Your Honor, again, there is no  
24 objection as page 6 is written. The state had  
25 requested certain jury instructions be given.

1 We've argued that, I think, ad nauseam. And I'll  
2 stand on those arguments.

3 I don't want my lack of objection today  
4 to be seen as a withdrawal of our request for  
5 certain instructions, including the duty  
6 instructions we've submitted. But I don't have any  
7 additional argument on that.

8 THE COURT: If you're -- if both sides are  
9 incorporating the previous argument, let's just  
10 have that understanding, for one thing.

11 MR. KELLY: Thank you.

12 MR. HUGHES: With that understanding, I have  
13 no objection to page 6.

14 THE COURT: Okay. I -- I -- there's some  
15 other instructions I didn't put in and I'm still  
16 going to discuss. But I do want you to tell me  
17 specifically what -- without going to the full  
18 arguments again, what were you suggesting in this  
19 regard? Are you talking about what I prefaced?

20 MR. HUGHES: What you prefaced earlier, Your  
21 Honor, regarding in particular the  
22 creation-of-peril duty. It is a separate duty. We  
23 believe the Maldonado case recognizes it as a  
24 separate duty apart from the duty that is  
25 referenced on page 6 of the proposed instructions.

1 And as in the Brown case, where the jury  
2 was instructed on multiple bases of duty, we  
3 believe in this case if the evidence supports  
4 multiple duties, then that creation-of-peril  
5 instruction should be given.

6 And, again, I would otherwise incorporate  
7 my arguments from last week and yesterday.

8 THE COURT: Okay. And I'll incorporate the  
9 defense arguments on that. For the reasons stated,  
10 I'm not going to do that. And I know there's the  
11 Brown case. There's the Far West case. I looked  
12 at Far West again this morning.

13 And in Far West there's an instruction  
14 with regard to duty. Maybe I can -- I can wait on  
15 that. I think the defense might be bringing  
16 something up anyway about this.

17 In the -- in the Brown case, there it's  
18 like you can find this duty if you find any. Did  
19 they say, well, do you find it beyond a reasonable  
20 doubt that there's a duty because of this? Do you  
21 add an element to prove?

22 In the Far West case it was presented,  
23 just stated something like the employer has a duty  
24 to provide a safe workplace, something like that.  
25 There was an objection to that, and it was held to

1 be an appropriate way to apprise the jury of duty.

2 Anyway, I note your -- your arguments on  
3 that.

4 Mr. Kelly, on page 6, then. Your -- your  
5 comments.

6 MR. KELLY: Judge, again, I understand you've  
7 recognized this, but I would incorporate all of  
8 Mr. Li's arguments from last Friday and mine  
9 yesterday. But with all due respect, Judge, to the  
10 Court, this is just flat wrong instructing the jury  
11 as to this general duty of care.

12 And I ask this rhetorical question: Does  
13 that -- what would be the purpose of instructing  
14 the jury in this regard?

15 THE COURT: I -- if there's a duty, if there's  
16 a general duty of care or some duty of care, then  
17 omissions -- which you've argued this case has been  
18 about from the beginning, omissions. You've said  
19 it's omissions, not actions. The state has said  
20 it's actions. You said omissions.

21 But if there's a -- if there is a general  
22 duty of care as discussed by the Supreme Court in  
23 Gibson, then omissions can be the basis of finding  
24 conduct. That's -- that's the effect of it.

25 MR. KELLY: What we've said since day one is

1 that omissions relate to a standard of care under  
2 civil law that due to this accident may provide a  
3 basis for civil negligence and responsibility. But  
4 we've always maintained that this was not a crime.  
5 It was an accident. And the reason it is not a  
6 crime is because the affirmative acts of Mr. Ray  
7 cannot be established under Arizona law. And that  
8 was the argument in some 46 pages of a brief  
9 prepared by Ms. Seifter and argued by Mr. Li.

10 But -- but here's -- the problem I have  
11 today, Judge, is -- and I'm asking this question.  
12 So if we instructed the jury, it begs the question  
13 what if the jury goes back and deliberates and  
14 says, okay, there's a violation of that general  
15 duty that a person has to avoid creating the  
16 situation which could pose an unreasonable risk?  
17 They say, yeah. I -- we think there's been a  
18 violation. We have no instruction or no ability to  
19 determine whether or not that violation is the  
20 result of JRI, its employees, or Mr. Ray. And  
21 we've heard in this case the factual information  
22 that this case relates to all three.

23 The second inquiry or difficulty that we  
24 have and the potential for an erroneous verdict is  
25 we have no understanding as to a burden of proof,

1 which may be necessary for the jury to rely on to  
2 make a determination as to whether or not the duty  
3 has been violated. That's a problem.

4 And then, of course, the -- the big  
5 problem is, how does that in any respect relate to  
6 the elements of the crime of manslaughter, which is  
7 further defined in the instructions. So we believe  
8 it's -- without waiving our previous arguments,  
9 that the Court's finding of a duty was an on-off  
10 switch, which allows us to continue but should not  
11 be instructed -- or should not be given to the  
12 jury.

13 THE COURT: I'm sorry. It was an on-off  
14 switch?

15 MR. KELLY: In other words, had you not found  
16 some existence of a duty, the Rule 20 would have  
17 been granted and this case would have been  
18 dismissed. You found a duty. So we're now  
19 continuing. So it's a Court determination and not  
20 a jury determination. It's a legal determination.

21 And, Judge, again, looking at the other  
22 side of the coin, so does this mean, then, that the  
23 government can stand up and argue that my client  
24 was reckless, as that term is defined under the  
25 criminal code for manslaughter, because he didn't

1 have a first-aid kit, an adequate first aid kit,  
2 that his company didn't do a medical screening of  
3 participants?

4 I would submit that's a very, very  
5 dangerous path to go down in the state of Arizona  
6 if that's now going to become the purported factual  
7 basis for criminal responsibility, recklessness, or  
8 criminal negligence. Just simply wrong. And --  
9 and that's what this implies.

10 And I jumped right to the proposed  
11 definition of "duty." But when you look at the  
12 first paragraph, if you read that and then the  
13 proposed general duty instruction, it almost  
14 implies that's the responsibility of the jury. And  
15 it happens to appear on page 6 of the proposed  
16 instructions well before the definition of  
17 manslaughter and negligent homicide -- I take that  
18 back. It's right before.

19 I would suggest, like every other case,  
20 that if you wanted to find conduct, voluntary act,  
21 and omission, that we do so and leave it at that.  
22 It's a problem. If somehow -- and I recall  
23 Mr. Li's argument some months ago. If somehow that  
24 my client did not have emergency medical providers  
25 at the scene that that somehow equates to be -- to

1 becoming criminally responsible for recklessness.

2 And I think the example that we argued  
3 earlier was if that's the case, then in a  
4 manslaughter case based on drunk driving is the  
5 person not reckless if he happens to go drinking  
6 that evening with a bunch of doctors and your  
7 designated driver is a medical provider? Now  
8 you've overcome this idea of recklessness under  
9 Arizona law.

10 That's -- that's what the government  
11 would be arguing, that my client would have never  
12 been charged with a crime of manslaughter if he  
13 would have had a nurse on the scene or if he would  
14 have had a better first-aid kit or if he would have  
15 taken medical information from the participants  
16 before they signed a waiver. That's the other side  
17 of what the state's arguing.

18 Judge, I just submit it's wrong. It  
19 cannot be right because it can mis -- mislead this  
20 jury into an erroneous verdict. And what -- and  
21 I'll say this one thing -- final thing, under  
22 13-201 I believe it is an omission under the  
23 criminal law. An omission is -- an omission  
24 associated with a statutory obligation such as  
25 registering for a sex crime.

1 So if you fail to register, the  
2 government can show that omission in front of a  
3 jury, or the duty-to-report statute. If you're in  
4 that special classification, you fail to report an  
5 observation to a child that you're required to do.  
6 That's what omission is talking about. It's not  
7 talking about not having a first-aid kit, which the  
8 government has been arguing in this case.

9 So now we're at this critical juncture --  
10 I'm not going to reargue Mr. Li's Rule 20. But we  
11 believe that it was simply what I just called an  
12 "on-off switch." You found that duty, and we are  
13 proceeding. But to instruct the jury in this  
14 regard would be highly improper because it suggests  
15 an erroneous verdict if they simply -- as you write  
16 here, before you may convict the defendant, you  
17 must find the state proved beyond a reasonable  
18 doubt that the defendant committed a voluntary act  
19 or omission.

20 Then you write, the defendant was under a  
21 general duty of care to a person -- duty of -- the  
22 defendant was under a general duty of care a person  
23 has to avoid creating a situation which would pose  
24 an unreasonable risk of harm. So if they find that  
25 they violated -- that Mr. Ray has violated that

1 duty, they could find him guilty. And that is  
2 civil law. That's a tort.

3 THE COURT: You're bringing up a lot of things  
4 that occurred to me in -- in drafting this. When  
5 omissions come into the picture, it really -- it  
6 complicates things a great deal. And I had to  
7 think very closely about what -- what should --  
8 what should be in the instruction, what's  
9 appropriate.

10 I made a determination consistent with  
11 the Gibson case, although that's a civil case, that  
12 a duty would attach in this situation. That was  
13 the decision. The appellate Court knows what  
14 happens, what the jury does. But the Appellate  
15 Court looked at it and decides, no. This is one of  
16 those situations the public policy decides? No.  
17 It shouldn't be the case that there is a duty in  
18 this type of case or class of case. That could be  
19 the situation.

20 But -- and I'll say that, Mr. Hughes.  
21 This -- without the state urging omission -- which  
22 can only be heard if, in fact, there is a duty to  
23 base it on. Without that the instructions go in  
24 with the normal instructions and the voluntary act,  
25 and it proceeds in that fashion.

1 With that I've made a decision. And I --  
2 and I think this instruction is consistent with  
3 that. But it certainly raises a major legal issue.  
4 I would address Mr. Kelly for the -- for the -- and  
5 it occurred to me would a jury just look at this  
6 and say we don't need have to go any further? Look  
7 at that. Any omission or there's a reasonable duty  
8 of care, what's that.

9 But then there are all these other very  
10 detailed instructions later about proof beyond a  
11 reasonable doubt. I've incorporated a lot of the  
12 language that Judge Sult used in the William G.  
13 case, a lot of that language that they have to get  
14 through. That's in there.

15 But, Mr. Hughes, yes. A tremendous legal  
16 issue here.

17 MR. HUGHES: Your Honor, I think the legal  
18 issue, which is the defendant -- the defendant  
19 claims he'll stand in jeopardy of being convicted  
20 simply because of an omission and that's it  
21 overlooks the fact that the jury is instructed on  
22 the definition of "manslaughter" and on the  
23 definition of the "lesser-included negligence."

24 And that instruction says, No. 1, caused.  
25 And we can read into that caused by an act or an

1 omission the death of another person. And then the  
2 omission, of course, would require that they find  
3 that it was the omission as is used as this term of  
4 art, which was the defendant failed to perform an  
5 act in violation of his duty.

6 So it's not the jury goes to the point  
7 where they find defendant had an omission and they  
8 find him guilty. That takes one instruction in a  
9 complete vacuum. It ignores the manslaughter  
10 instruction, which is very clear that the jury must  
11 find the defendant caused the death of another  
12 person and was aware of and showed a conscious  
13 disregard of a substantial and unjustifiable risk  
14 that his conduct would cause another person's  
15 death.

16 So the defense's argument that if they  
17 find, well, Mr. Ray didn't provide a first-aid kit  
18 they'll convict him, juries would have to find  
19 these acts -- I think it's an absurd example that  
20 not only did the lack of a first-aid kit cause the  
21 death of another person, but that Mr. Ray was aware  
22 of and showed a conscious disregard of the  
23 substantial and unjustifiable risk that his lack of  
24 a first-aid kit would cause another person's death.  
25 There's been no testimony that a lack of a

1 first-aid kit caused another person's death.

2 It's certainly something I think the jury  
3 can consider in determining would these people have  
4 a shockable rhythm, for example, when the other  
5 EMTs arrived. But it's not a "in there," "don't go  
6 any further," because you do have the manslaughter  
7 definition.

8 Mr. Kelly also argued that the omission  
9 as is utilized in the statute is related only to a  
10 violation of an omission created by another  
11 statute. And that's incorrect. The Brown case and  
12 the Far West case both dealt with situations where  
13 duties were imposed by common law. They talked  
14 about that and said that in a criminal case -- and  
15 I believe both Brown and Far West were  
16 manslaughter or negligent homicide cases.

17 They said that where the duty is imposed  
18 by the common law, that duty can be the basis for  
19 an omission with respect to manslaughter liability.  
20 And that's precisely the situation that we have  
21 here.

22 The definition of "duty" that's used on  
23 page 6 appears to be, if not identical, nearly  
24 identical to the language in paragraph 34, the  
25 Gibson case. I believe it correctly states the

1 law.

2 MR. KELLY: Judge, I have to reply. If my  
3 example of a first-aid kit is absurd, then it begs  
4 the question as to why we've been here for four  
5 months and repeatedly over our objections regarding  
6 relevancy and admissibility we've heard this stuff.  
7 We've objected each and every time that that  
8 information was not relevant, and the government  
9 proffers the relevancy because it relates to the  
10 purported recklessness of our client and now in  
11 this jury instruction takes the opposite tack.

12 Mr. Hughes did the same thing yesterday  
13 when we requested our First Amendment instruction,  
14 that somehow yesterday all of a sudden the Vision  
15 Quest and the angels of death and all that stuff  
16 was not relevant because they didn't want the  
17 instruction in, but we spent four months listening  
18 to it.

19 And it aggravates me to listen to someone  
20 call my argument absurd when all I'm doing is  
21 anticipating what the government is going to argue  
22 as it relates to an omission.

23 Now, if they're going to stand up, as  
24 Mr. Li did, and give us their word that they're not  
25 going to argue that a first-aid kit, the lack of a

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1 medical screen, the lack of a certified medical  
2 personnel at the scene somehow does not constitute  
3 omission, then I'd like to hear it.

4 MR. HUGHES: Your Honor, the issue  
5 specifically to first-aid kits, the Court recalls  
6 those questions were very early in the case before  
7 the Court made its ruling regarding Steve Pace, who  
8 was a proposed expert that the state was going to  
9 call.

10 Steve Pace, we expected, would testify  
11 about a duty of care, we believe, that the  
12 defendant owed. And we believe Steve Pace would  
13 testify that factors that a person running an  
14 outdoor activity should do -- a reasonable person  
15 running an outdoor activity would be not to run  
16 that activity if you don't have an adequate  
17 first-aid kit, for example.

18 That testimony was introduced again. It  
19 was very early and it was -- it was before the  
20 Steve Pace ruling was made by the Court. I don't  
21 believe there's been testimony about a first-aid  
22 kit since then. I do think it's something, again,  
23 that the jury can consider.

24 The jury has heard from the doctors and  
25 from the EMTs about the value, for example, having

1 an automated electronic defibrillator and the fact  
2 that that shockable rhythm can be lost very, very  
3 quickly. And in this case the testimony was for  
4 Kirby Brown and James Shore. They were in there  
5 for 15 minutes during which time that shockable  
6 rhythm could very well have been lost.

7 If they had been taken out, which was an  
8 omission by Mr. Ray -- but if the victims had been  
9 taken out very early rather than left in there 15  
10 minutes, if there had been an automated electronic  
11 defibrillator present, if Mr. Ray had insisted on  
12 that before he proceeded, perhaps we'd have a  
13 different situation.

14 Those are things, I think, that are  
15 legitimate arguments based on the testimony that's  
16 come to the jury from the different medical doctors  
17 today.

18 MR. KELLY: Your Honor, given that response,  
19 I'd move to strike evidence relating to a medical  
20 screen prior to the signing of the waiver,  
21 first-aid kit, the inadequacy or purported  
22 inadequacy, the fact that no employee or volunteer  
23 of James Ray International was certified as a  
24 medical provider, nurse, or a doctor, and the fact  
25 that there was not an AED on scene somehow is

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1 relevant to this case and that the jury be so  
2 instructed before the beginning of closing  
3 arguments.

4 THE COURT: We've got a motion mixed in with  
5 the instruction conference.

6 Mr. Hughes.

7 MR. HUGHES: Your Honor, the state opposes  
8 that motion. As I was just arguing each of  
9 those -- well, I didn't argue about the others, but  
10 I was arguing specifically about the lack of a  
11 first-aid kit or the AED. Those are generally  
12 relevant. There's been testimony regarding that.

13 The lack of other medical people that  
14 were present who could have provided care, again,  
15 is something that is relevant for the jury to  
16 consider in determining whether or not Mr. Ray's  
17 omission in that 15 minutes or so time of pulling  
18 people out of the sweat lodge was relevant to these  
19 particular charges.

20 The state would oppose that motion.

21 MR. KELLY: I guess, Judge, my argument is not  
22 so absurd as to the first-aid kit. In regards to  
23 the issue, again, we would object to the first and  
24 last paragraph being provided because of the very  
25 reasons articulated by Mr. Hughes.

1 What we're doing here is inviting error  
2 into this case. You just can't have it both ways  
3 as the State of Arizona -- we're entitled to notice  
4 of the charges and notice of the basis of those  
5 charges. And simply providing 10,000 pages of  
6 disclosure does not suffice. We went through that  
7 yesterday.

8 And now for the government to get up and  
9 actually create error by arguing omissions based on  
10 the lack of a first-aid kit is wrong. And they're  
11 not willing to stand up and say that they're not  
12 going to do that. And so if that's the case and  
13 this instruction is given, it's going to allow this  
14 jury to find my client guilty of committing a tort,  
15 which, given the verdict form, will be immediately  
16 transformed into a serious crime in Arizona.

17 We didn't have notice of that, Judge.  
18 It's a basic due-process violation beginning from  
19 the notice requirement under the return of an  
20 indictment all the way to prejudicial error and  
21 confusion of issues at this point in the trial.

22 We'd ask, Judge, again, reserving all our  
23 other arguments, that the finding of a duty is  
24 simply a Court determination, which you have made.  
25 And now there should be no discussion in that

1 regard to this jury. There should not be an  
2 instruction in that regard to this jury.

3 And then the government, I suppose, is  
4 going to stand up and argue that not having a  
5 first-aid kit is somehow -- meets the culpable  
6 mental state of recklessness under the criminal  
7 code.

8 But I believe our previous objections are  
9 well preserved. And the issue now is, what do we  
10 do today. And I would request the entire first  
11 paragraph, the general duty instruction, be  
12 stricken.

13 And, finally, Judge, as Ms. Seifter and I  
14 argued yesterday, there is a principal of estoppel,  
15 and the government at some point cannot just keep  
16 creating legal theories of culpability. They have  
17 to be estopped from doing that at some point in  
18 time. We discussed that briefly yesterday, but --  
19 I put that on the record as well.

20 But our request today, this morning -- I  
21 know there's a jury waiting. I know that time --  
22 like you guys mentioned, four months is a long  
23 trial. But this is an important issue. And the  
24 reason it's so important is because I think if  
25 anyone sat here -- or everyone who sat here for

1 four months and listened to all the evidence, if  
2 the jury is instructed as to this general duty, the  
3 preceding paragraph could find that the duty was  
4 breached and then erroneously find my client guilty  
5 of manslaughter. That's the problem, Judge.

6 THE COURT: Maybe -- well, I'm denying the  
7 motion to strike that's pending, and I'm denying  
8 the motion to strike at this time. I'm going to  
9 make the call here on the jury because there are a  
10 number of complex things to discuss here that  
11 weren't really raised until yesterday.

12 It's good to have instructions. The bulk  
13 of them before the trial began can be looked at all  
14 the way through. I want to say this: I went back  
15 and looked at some of the pleadings. And the state  
16 was urging a duty of care in citing Far West, I  
17 know, but -- but other cases talking about a duty  
18 of care. So that's -- that's not new to the case.

19 Articulating the specific duty. Mr. Li's  
20 argued a great deal about that. That never was  
21 articulated with the specificity that came about  
22 during the Rule 20 proceedings. But maybe this  
23 issue has to be looked at in conjunction with the  
24 instruction that both sides requested, the  
25 antiduplicity instruction, the multiple-acts

1 instruction on page 10.

2 MR. LI: Your Honor, can I -- can I just make  
3 a suggestion? And I'm just trying to cut this knot  
4 here. It seems to me that, essentially, what the  
5 Court's instruction is relating to the duty is,  
6 basically, the manslaughter statute.

7 What they're saying -- what the state  
8 is trying to prove is that Mr. Ray violated his  
9 duty to not be reckless and not -- you know -- not  
10 put people in substantial and unjustifiable risk of  
11 death. That's the -- the sort of care that this  
12 Court, I think, is talking about in this particular  
13 instruction, or at least that -- that's the real  
14 issue in this case.

15 I don't -- I think -- I think the problem  
16 with this particular instruction is the state is,  
17 essentially, asking this Court to instruct this  
18 jury with inconsistent instructions -- one  
19 instruction that says this is a criminal case,  
20 here's -- here's what the elements are for  
21 manslaughter, and the Court has written them. And  
22 the other instruction is, oh, and here's -- here's  
23 the civil standard for -- for liabilities. But I  
24 can't tell you what to do with that. And the --  
25 and the problem that the jury is going to have is

1 conflating those two.

2 So I think to the extent that the  
3 Court -- you know -- believes that some finding by  
4 this jury has to be made relating to some duty --  
5 it would relate, essentially -- they would have to  
6 convict Mr. Ray. That's what they would have to  
7 do. So this instruction is just -- it serves no  
8 purpose. And so that's the problem, other than to  
9 confuse.

10 THE COURT: Here's -- get right to the -- the  
11 purpose. I think what's anticipated is that the  
12 state may be arguing there were certain omissions,  
13 not necessarily with regard to the first-aid kit,  
14 but as to when a problem arises, don't you do  
15 something? I mean, are you -- it was the argument.

16 The state said, well, that's really  
17 conduct. It's not omitting to do something. It's  
18 continuing conduct. And that's not an omission.  
19 We had all that discussion. So if there -- if  
20 there is some -- if there's not an instruction  
21 saying there is some kind of duty here where  
22 omissions would be included, it allows for the  
23 argument of -- you know -- the -- the law doesn't  
24 allow this. The law doesn't require somebody to do  
25 something in this situation. I think that's what's

1 being anticipated.

2 MR. LI: But is the anticipation that I'm  
3 going to make that argument?

4 THE COURT: It's -- the question is one of  
5 law. Was there a duty in this situation? I found  
6 that there was. Under all the circumstances, a  
7 duty of care arose. And it's the reasonable  
8 standard of care. That's the decision.

9 If someone disputes that and said there  
10 wasn't a reasonable standard of care, there's a  
11 legal argument that is really JRI's standard of  
12 care and not -- you know -- maybe their's is a  
13 standard of care that wasn't ours. That's a  
14 different issue than is there standard of care  
15 under the circumstance for some defendant. That's  
16 the first issue. I decided there was. If I decide  
17 that and there's a basis for it, then that brings  
18 in the instruction that allows consideration of  
19 omission.

20 MR. LI: Well, I think -- and I understand  
21 what the Court's --

22 THE COURT: What you're suggesting is, I  
23 think, it would be very good to take this out.  
24 This is very, very problematic and troubling to me.  
25 All the things that are mentioned are real

1 considerations that I have to weigh against. What  
2 does the law tell me to do, though, and what is the  
3 correct application of the law based on the Brown  
4 case, based on Far West, based on Gibson?  
5 That's -- that's what I'm dealing with.

6 MR. LI: Well, we understand that, Your Honor.  
7 And -- and we -- we would like this jury to be  
8 instructed in a way that's consistent and that  
9 won't lead to confusion. So we do understand the  
10 Court's dilemma with this particular issue.

11 The problem is as drafted and as will  
12 be -- if presented to the jury, it will invite  
13 confusion because it's not clear what they're  
14 supposed to do with that.

15 The problem is there is a manslaughter --  
16 I know what Mr. Hughes says. They'll just read  
17 later on. They'll see there's a manslaughter  
18 statute that defines everything and what they're  
19 supposed to do. But -- but it is clear that these  
20 are inconsistent statutes -- or inconsistent  
21 instructions. Somebody could look at these and not  
22 know what they're supposed to do. And that's the  
23 problem that we have here. And it invites error  
24 because -- because it could result in a conviction  
25 for, essentially, a violation of a civil duty.

1 THE COURT: If the -- if the other  
2 instructions ignore it.

3 Mr. Kelly.

4 MR. KELLY: Judge, I think this is more simple  
5 after listening to the discussion between you and  
6 Mr. Li. If we look at the definition of  
7 "manslaughter," paragraph 2, it says that the  
8 defendant was aware of and disregarded the risk  
9 that his conduct would cause another person's  
10 death. And then on page 6 you have defined  
11 "conduct" as either an act or an omission.

12 And so in your example that -- if the  
13 state wanted to argue that the omission that  
14 relates to recklessness for manslaughter is his  
15 failure to act in the sweat lodge, the law is  
16 clear. They can do that. Conduct encompasses  
17 both.

18 MR. HUGHES: And, Your Honor, that's precisely  
19 what these instructions do. The omission can only  
20 be held against Mr. Ray if the jury finds that  
21 omission was a failure to perform an act that was  
22 required by law. And that is why the duty is  
23 necessary. Otherwise any omission by Mr. Ray, even  
24 if it didn't violate a duty, could be held against  
25 him.

1 The instructions as written with this  
2 definition of "duty" following directly within a  
3 sentence from the definition of "omission," I think  
4 it makes it very clear to the jury. You are  
5 defining what an omission can be. And the omission  
6 follows directly or nearly directly beneath  
7 "conduct" where you're defining what "conduct" is.  
8 Those terms, then, of "conduct" are used later on  
9 in the manslaughter and the negligent homicide  
10 statue.

11 Again, the -- the jury must find that the  
12 manslaughter elements were met, that the conduct  
13 that -- that caused the death occurred, and that  
14 there was a disregard of substantial, unjustifiable  
15 risk that conduct would cause another person's  
16 death.

17 There is simply -- unless the jury were  
18 to throw instructions out the window, including the  
19 primary instruction of the entire case, which is  
20 the manslaughter instruction, there's no risk  
21 whatsoever what the defense is -- is urging.

22 The instructions as written are  
23 consistent. They flow. They define in the section  
24 of conduct what an omission is and the duty that  
25 gives rise to an omission that's -- that is

1 actionable.

2 THE COURT: That's why it's there. One thing  
3 I had considered is, one thing, making it general  
4 rather than putting the defendant, Mr. Ray, being a  
5 person or general noun -- putting a person under a  
6 general duty of care to avoid creating, et cetera.  
7 And a sentence there, however, you may not convict  
8 unless you find beyond a reasonable doubt that the  
9 elements, and then refer to the other instructions.  
10 Just flag them right there. I thought about that  
11 to head off what Mr. Kelly and Mr. Li, Mr. Kelly in  
12 particular, his first concern.

13 But the problem is with -- without a  
14 duty, talking about an omission would arguably be  
15 improper. But I tried to get us here a minute ago.  
16 And that is to look at page 10 and -- and No. 10,  
17 multiple acts. This is really having to do with  
18 maybe the -- the act that's going to be selected as  
19 the act of liability or the omission of liability.  
20 How much does it really relate to just facts that  
21 proceed through the -- through the case?

22 MR. LI: That -- that is another problem. And  
23 it was part of the Rule 20 argument that -- that --  
24 that this court entertained several weeks ago. And  
25 we understand -- and so it is necessary to have

1 those instructions in there because they need to  
2 say what it is that caused -- you know -- the harm.  
3 And the jury needs to be unanimous on it too.

4 The question we're talking about here  
5 is a question of what is the standard that the  
6 jurors need to use. And I understand the  
7 Court's -- you know -- hesitation in imagining that  
8 a jury might disregard some instructions and -- you  
9 know -- focus on other instructions.

10 But I think Mr. Hughes saying that  
11 there's no chance that that would happen belies 20  
12 years of experience for me and I'm sure quite a  
13 few -- quite a few years experience for the Court  
14 and all the years of experience for everybody in  
15 this courtroom. That's the problem with jury  
16 instructions. They need to be absolutely clear.

17 And when you have what are fairly  
18 inconsistent -- potentially inconsistent  
19 instructions, the jurors don't know what to do and  
20 they can -- they can start running with that.  
21 We've all seen it. So the -- so it is critical  
22 that we get this one right.

23 And I don't think a duplicity instruction  
24 would solve that particular problem. That just  
25 says what acts should -- should you look at,

1 jurors. You know, make sure you agree on all the  
2 same, single act --

3 THE COURT: Look at the major distinction  
4 there. If it is a voluntary act that they're --  
5 they're looking at and that's -- well, go ahead.

6 MR. LI: It's a standard issue, Your Honor.  
7 It's not -- it's not a question of which act are  
8 they looking --

9 THE COURT: I know it's a standard issue.  
10 It's that the Court determines the existence of  
11 duty. A jury determines whether that duty has been  
12 breached and causation. That's it. Whether  
13 there's been a breach of the duty, has there been a  
14 violation of the duty. That's -- that's up to  
15 the -- to the jury to determine through the  
16 causation instruction and the -- and the mens rea.

17 MR. LI: In a civil case, Your Honor, the  
18 jurors are supposed to determine whether there's  
19 been a breach of the duty, civil duty.

20 THE COURT: Then what's all this language that  
21 we're putting in here from William G. talking about  
22 it's got to be a substantial -- you know --  
23 substantial, unjustifiable risk? It's got to be a  
24 gross deviation? Those are all jury questions,  
25 aren't they?



1 MR. LI: Yes. I'm sorry. But the question  
2 is -- those are different standards. One standard  
3 is a question of whether there's a civil duty of  
4 care, which is what is being identified in that  
5 particular section. The other one is what is the  
6 meaning of "substantial and unjustifiable risk"  
7 under the statute for criminal manslaughter?  
8 That's the difference.

9 THE COURT: The whole discussion with  
10 Judge Sult about how you got to make a distinction  
11 between civil standard and the others.

12 Ms. Rybar, I'll tell you right now, we're  
13 going to take a recess. You can tell the jury they  
14 can reassemble at 1:15. Thank you.

15 (Recess.)

16 THE COURT: The record will show the presence  
17 of Mr. Ray and the attorneys. I have a suggestion  
18 in thinking about what's been raised. I had the  
19 concern about possible confusion. And if I've made  
20 the determination of duty and it's a fact what the  
21 Court does, there is no need for the -- for the  
22 jury to -- to know that. What they need to know  
23 from the state's standpoint is that it would be  
24 legitimate to argue appropriate omissions.

25 The defense point is that this is just

1 confusing. It seems to set up a very low civil  
2 standard and -- and it conflicts with the other  
3 much, much higher standard that goes in a  
4 determination of criminal liability, although that  
5 is for the -- the jury determines breach of duty.  
6 It determines whether or not it's been breached and  
7 whether the standard of care has been violated,  
8 causation. They determine all that.

9 And what I suggest, and I'd ask the  
10 parties to look at, is what needs to be done, I  
11 think, at the end is to alert that the duty is  
12 defined by the statutes in this case. It's that  
13 high -- it's that high standard. That's the nature  
14 of the duty. And that should eliminate the risk  
15 of -- that's being talked about.

16 I've made the decision on duty. That's  
17 been made. And I believe it to be the correct  
18 decision. I see the problem with the confusion.  
19 And so figure out -- and I'm just going to be a  
20 minute. I think if you incorporate the right  
21 language that that -- that should be able to take  
22 care of it. If you can't, then I'll just draft  
23 something.

24 Thank you.

25 (Recess.)

1 THE COURT: The record will show the presence  
2 of the defendant and the attorneys. And I have  
3 instructions. I clarified, I didn't expect there  
4 would be an agreement, but I did want to have some  
5 proposed instructions. So I assume you've given  
6 them to the clerk also. And there can be a record  
7 made.

8 The problem that I've noted is this: The  
9 instruction as I proposed and as the state has  
10 given, suggests, is just misleading. It shows --  
11 it puts out a low civil standard, and then there's  
12 a later, much higher standard that's presented.

13 And I think if you look back at the cases  
14 that the state cited in the arguments relating to  
15 expert witness testifying, the duty of a -- of a  
16 coach toward players, it's not a normal, reasonable  
17 care duty. It's a duty not to increase the  
18 inherent risks that are involved in learning or  
19 participating in a sport, something like that.

20 Same kind of issues as here. It's not --  
21 it's misleading and a real problem to suggest to  
22 the jury that the only -- that the duty involved is  
23 one of reasonable care, because it's not.

24 And so the state's suggestion to do  
25 nothing to clarify the problem, the defendant's

1 suggestion is along the line of what I thought. I  
2 had written something like whether or not the  
3 defendant's conduct included the omission to  
4 perform the duty imposed by law must be determined  
5 by you in accordance with instructions, and then  
6 put the number of instructions to make sure that  
7 there's no confusion. They need to apply the  
8 instructions in this case.

9 I don't know why the defense -- to  
10 eliminate paragraph A takes out the whole context  
11 of why an omission can be -- can be discussed. I  
12 don't want any more words in these instructions  
13 than what are necessary. But the idea here is I've  
14 determined duty. All the -- all the jury does now  
15 is determine whether or not, consistent with a  
16 criminal statute, the duty has been violated.  
17 That's it.

18 So I don't -- I just don't know why the  
19 defense wants to take out the first part of  
20 paragraph A.

21 MR. KELLY: And, Judge, please understand that  
22 our suggestion is that this legal discussion is  
23 incorporated into the definition of "manslaughter"  
24 because it makes reference to conduct. And  
25 "conduct" is defined as an act or an omission.

1 And, thus, it's necessary for the state to prove  
2 beyond a reasonable doubt those elements.

3 This jury simply does not need to know  
4 anything about this lengthy underlying discussion  
5 as it relates to duty. You made the finding of  
6 duty. And, thus, under proposal 1, we believe  
7 that's a clear and concise way.

8 And if the state were to argue that  
9 somehow the omission that Mr. Ray did not respond  
10 to someone in distress, using that as an example,  
11 somehow equates to this culpable mental state of  
12 recklessness, they can do that, and it's covered  
13 because it's defined under the term "conduct."

14 THE COURT: I see that. I would say it would  
15 be not --

16 MR. KELLY: So, thus, the language under A,  
17 which I think is 13-201.

18 THE COURT: Yes.

19 MR. KELLY: I would submit, Judge, that that's  
20 a basic, legal principal for the Court to decide as  
21 well that something that would be applicable in a  
22 Rule 20 analysis, if appropriate. But I guess our  
23 position is that, again, it would simply confuse  
24 the jury, when actually what they need to decide is  
25 whether or not the elements of a crime have been

1 established beyond a reasonable doubt.

2 And the terms in the elements of the  
3 crime should be defined, and "conduct" is defined.  
4 "Substantial and unjustifiable risk" is defined.  
5 "Voluntary act" is defined. And "act" is defined.  
6 And that's why we believe this is the proper way to  
7 instruct the jury.

8 We -- after listening to your discussion,  
9 we did submit this proposal No. 2, but we simply  
10 believe that's a misstatement of the law. We're  
11 doing it to try to facilitate resolution.

12 THE COURT: And I know. People are reserving  
13 their objections. I've made that clear.

14 MR. KELLY: Right.

15 THE COURT: Mr. Hughes, you see the problem of  
16 having just two drastically different standards out  
17 there. The William G. case makes clear how  
18 different they are. So what -- what do you say  
19 about these, either of the two proposals here?

20 MR. HUGHES: Your Honor, again, the state  
21 would ask that the state's proposed instruction be  
22 given. I believe when it is read as a -- a  
23 component of the omission language, which is a  
24 component of the instructions on conduct, it is  
25 clear that that is limiting omissions to only

1 omissions that violate the duty. It's not  
2 indicating any criminal responsibility for the  
3 defendant for those omissions.

4 Criminal responsibility begins -- begins  
5 to be implicated in the manslaughter and the  
6 negligent homicide instructions, which follow,  
7 which require the specific findings by the jury  
8 that the elements of those crimes were met.

9 With respect to the defendant's request  
10 that the voluntary act language, which is the first  
11 paragraph under A on page 6, be removed, it's my  
12 understanding that language is typically included  
13 to protect the defendant if the defendant -- you  
14 know -- in case there's -- you know -- the  
15 defendant had some sort of involuntary action that  
16 he would be held responsible for.

17 If the defendant does not seek the  
18 protection that the voluntary-act instruction  
19 includes under the -- which is the first paragraph  
20 on page 6, the state doesn't really have a horse in  
21 that race. Although I do think it's an appropriate  
22 instruction on the law that a defendant can only be  
23 held responsible for voluntary conduct.

24 MR. KELLY: Judge, what I'm requesting, as it  
25 states here, we're not requesting the voluntary act

1 definition be omitted. We're asking -- we suggest  
2 that those definitions be placed in the paragraph,  
3 page 7, after the definition of "manslaughter."  
4 Just flow better.

5 So it clearly states here, just simply  
6 move the definition of "conduct," "voluntary act,"  
7 and "omission," as presently stated, from it's  
8 current location to a different location. That's a  
9 minor suggestion.

10 THE COURT: I'm still -- I'll be able to --  
11 I've got in mind what I'm going to do. It would  
12 not be good to go out there with this general civil  
13 standard. The only thing I'm still concerned about  
14 is why there's such a problem with A, because it  
15 seems to -- to frame it so.

16 MR. KELLY: And I haven't really addressed  
17 that. If we take a look at the first sentence, the  
18 minimum requirement for criminal liability is the  
19 performance by a person of conduct, which includes  
20 a voluntary act or an omission to perform a duty  
21 imposed by law.

22 First of all, Judge, it's confusing from  
23 the perspective that we have those terms defined  
24 subsequently in the same paragraph then  
25 incorporated into the actual criminal statute where

1 the jury has to make an assessment. The problem  
2 with that statute is it wrongfully implies an  
3 improper burden of proof.

4 It would be better if -- if the paragraph  
5 began with the second sentence, before you may  
6 convict the defendant, et cetera. But it's -- it  
7 improperly implies that the -- that there is a much  
8 greater standard beyond a reasonable doubt to find  
9 that these acts or omissions constitute a crime or  
10 is somehow sufficient to establish a reckless state  
11 of mind.

12 Also it kind of begs the question as it  
13 relates further in the instruction relating to  
14 causation. So it could be misinterpreted or  
15 misimplied. And I believe the jury instructions  
16 are sufficient if the definition of the terms are  
17 provided of the -- identical to the terms in the  
18 alleged crimes. That's what is at issue.

19 THE COURT: The last argument is -- is true.  
20 It just seems to leave out causation and those  
21 things.

22 MR. KELLY: The mens rea causation aspect.  
23 And, again, I believe it's parroted from 13-201,  
24 but I've never seen that statute provided to a  
25 jury.

1 THE COURT: I've never had an omission case  
2 either that I can think of. So that's -- that's  
3 what's making this so complex is the interjecting  
4 of omission. That's why you're seeing things that  
5 you've never seen before.

6 MR. KELLY: Right. But, again, if it were --  
7 which is kind the underlying premise of our point.  
8 If it's an omission such as the failure to  
9 register, then that conduct, the person's failure  
10 to register, is taken care of in the definition of  
11 the crime itself and the definition of the word  
12 "conduct." Anything additional is unnecessary and  
13 potentially confusing.

14 So in our first proposal, it was simply  
15 to provide the various definitions of the words and  
16 the various crimes and move on.

17 THE COURT: I think that -- I'm going to give  
18 the lesser included on negligent homicide. I think  
19 that has to somehow be incorporated. I understand  
20 that it's included in page 6. I think it should be  
21 referred -- referenced also. There would have to  
22 be -- you know --

23 MR. KELLY: I agree.

24 THE COURT: A violation of manslaughter or the  
25 lesser -- if appropriate, the lesser included,

1 something like that.

2 MR. KELLY: I agree with that, Judge. It has  
3 to be consistent.

4 THE COURT: What this does, Mr. Hughes, is  
5 make clear that there -- there's a duty out there.  
6 They can find that -- it's up to them to see if the  
7 duty is violated. And the way they do it is to  
8 find a -- the criminal statutes in this case, which  
9 is -- it's odd, but that's what you were originally  
10 arguing a long, long time ago.

11 MR. HUGHES: Your Honor, the state agrees that  
12 was a duty. And the Court had made a ruling  
13 earlier that that would not apply. And certainly  
14 it is the state's belief that everybody is under a  
15 duty not to commit a violation of Arizona law.

16 But nonetheless, there are the additional  
17 duties that are recognized in Gibson and the Brown  
18 case and the Far West Sewer case. Both discussed  
19 duties that were less than the duty created by  
20 manslaughter. In the Brown case it was a duty to  
21 provide adequate care, a duty to comply with the  
22 court order. In the Far West case, it was a duty  
23 to obey OSHA regulations. Those were duties that  
24 were less than the standard, for example, of  
25 manslaughter.

1 And the Court said, if you find a  
2 violation of those duties that are imposed by  
3 statute or by common law, then that omission can be  
4 considered as whether the omission then is  
5 component of the greater manslaughter.

6 It's the state's belief that the jury  
7 needs to be instructed on all of the duties that  
8 were applicable to the defendant.

9 THE COURT: And I've indicated this isn't an  
10 automobile case. And you look at the Brown case,  
11 that had to do with concepts that come under  
12 vulnerable adult currently, I think. There's more  
13 basis there.

14 And what the jury needs to do is apply  
15 these statutes. And with this framework, the state  
16 can obviously argue omissions as a legitimate  
17 argument. You know. There would be a basis for  
18 it. And it also, I think, gives an accurate  
19 portrayal to the jury what the duty is.

20 It's not the standard of care. It's  
21 normally -- that's normally employed when it's in  
22 the criminal justice system. So -- okay. I've got  
23 something that will accommodate that.

24 Anything else on page 6?

25 MR. HUGHES: No, Your Honor.

1 THE COURT: Okay. Page 7?  
 2 MR. HUGHES: No changes, Your Honor.  
 3 THE COURT: Page 8?  
 4 Mr. Kelly, I don't want to go to fast.  
 5 MR. KELLY: Judge, page 7 is fine.  
 6 MR. LI: Your Honor, just so we understand,  
 7 what is the Court doing with paragraph A of -- or  
 8 the first paragraph of -- on page 6?  
 9 THE COURT: I'm not -- I'm just not going to  
 10 take time here. I'm going to incorporate the idea  
 11 to make sure what needs to be done is a focus on  
 12 the statutes, which I've indicated the state  
 13 initially argued. But -- and that's true. There  
 14 was a different question there about whether the  
 15 Court was going to recognize some duty. That's  
 16 what I'm going to do. I'll have a draft.  
 17 Mr. Kelly, ??  
 18 MR. KELLY: No objection, Judge.  
 19 THE COURT: 8?  
 20 MR. KELLY: Judge, we filed a brief in regards  
 21 to the mental state associated with the  
 22 greater-included crime. And that was filed this  
 23 morning. I'm not sure. You asked for some case  
 24 law that supported our position that it violates  
 25 due process. We've done that in a three-page

1 pleading. Have you had a chance to look at that?  
 2 THE COURT: Yes. And I was given the Sanders  
 3 case last night. I looked at that yesterday, and  
 4 then I got this brief.  
 5 Mr. Hughes, have you seen that?  
 6 MR. HUGHES: I have, Your Honor.  
 7 THE COURT: Okay. Mr. Kelly, anything to add  
 8 to the brief? And -- well, that's the authority  
 9 and what you argued yesterday.  
 10 MR. KELLY: Given that, Judge, I believe that  
 11 paragraph E should be stricken on page 8 and that  
 12 the word "knowingly" should be stricken from the  
 13 language in paragraph D on page 8.  
 14 THE COURT: Actually, it would say -- make  
 15 anything that had "knowingly" in it should be  
 16 removed.  
 17 MR. KELLY: Right. As well as, for the  
 18 record, paragraph 8 -- or excuse me. Paragraph F  
 19 on page 8, which defines "knowingly."  
 20 THE COURT: Mr. Hughes.  
 21 MR. HUGHES: Your Honor, the state for the  
 22 reasons raised yesterday believes it is appropriate  
 23 to give the jury the "knowing" definition. The  
 24 Sanders case and the brief that was filed this  
 25 morning apply to situations where the very charge

1 against the defendant is increased or a different  
 2 charge is brought against the defendant.  
 3 In this case the instruction for included  
 4 mental state recognizes the fact that the state can  
 5 prove a greater mental state and still pursue the  
 6 charge that has the lesser mental state. It's not  
 7 holding the defendant liable for a greater crime.  
 8 There is no jeopardy or due-process violation. The  
 9 defendant is facing the exact same crime, unlike  
 10 the situation in Sanders and the authority cited in  
 11 the brief.  
 12 This is simply a matter of explaining to  
 13 the jury how to analyze evidence in this case, and  
 14 it allows the jury to -- to -- to know what us  
 15 practitioners know, which is if you prove the  
 16 greater mental state, you've also proved the  
 17 lesser.  
 18 It is appropriate, and the definition of  
 19 "knowingly" and the reference to "knowingly" in the  
 20 included mental state should be given.  
 21 THE COURT: Mr. Kelly.  
 22 MR. KELLY: Judge, again, I mean, it's well  
 23 briefed that Sanders rejected that argument made by  
 24 the State of Arizona. And we'd suggest it should  
 25 be rejected today. We don't believe that given the

1 facts presented during this case that there's a  
 2 reasonable inference that Mr. Ray acted in an  
 3 intentional or knowingly manner in causing the  
 4 death of other individuals.  
 5 That would be a separate basis, does  
 6 violates due process, as we argued yesterday. And  
 7 there is simply an aspect of the impact of  
 8 potential prejudice to the defendant if the  
 9 government is allowed to argue mental states.  
 10 And -- and more importantly -- you know -- these  
 11 instructions come from the Judge, which implies  
 12 that somehow "knowingly" is something that should  
 13 be considered by they jury. So it has the  
 14 potential, again, for an erroneous verdict.  
 15 It's the one aspect of the case that  
 16 they're receiving directly from you, and now you're  
 17 asking them impliedly to consider "knowingly." And  
 18 we haven't had any notice of that until yesterday.  
 19 THE COURT: No. It tells them you can  
 20 consider them all, but you can eliminate the ones  
 21 that don't apply. And not that consistency would  
 22 be any argument for a later ruling if the initial  
 23 ruling was incorrect.  
 24 But I'm thinking back to when I ruled  
 25 that the state could not bring in evidence of

1 conduct or evidence that only related to criminal  
2 negligence. I ruled that that -- that couldn't  
3 come in. So if the state had charged the case as  
4 criminal negligence, the implication is maybe there  
5 would have been some other experts or some other  
6 things that were presented.

7 With that being said, if they'd done  
8 that, if they had a witness on the stand that then  
9 testified to a higher -- you know -- provided  
10 evidence of a higher level of culpable mental  
11 state, under the reasoning here that couldn't be  
12 done.

13 And as Mr. Hughes says, this is not a  
14 charging issue. It has to do with, in one sense,  
15 clarifying the mental states. I'm going to listen  
16 to arguments, obviously. And if it strays outside  
17 what is supported by evidence, I'll make rulings on  
18 that. I'm going to include this.

19 I'll note that, of course, I did  
20 eliminate "intentionally" for the reasons urged by  
21 the defense yesterday. I did not include the  
22 "intentional" language. I'm going to include  
23 "knowingly," just -- just as a definition. And --  
24 and we'll trust it would not be argued in some  
25 improper fashion, as with any instruction.

1 Anything else on page 8, Mr. Hughes?

2 MR. HUGHES: No, Your Honor.

3 THE COURT: Page 9 -- Mr. Kelly, anything else  
4 on page 8?

5 MR. KELLY: Judge, I want to make clear that  
6 the record reflects that we object to the -- any  
7 reference to the word "knowingly" or any definition  
8 of "knowingly" on page 8. I think --

9 THE COURT: I stated that at the start. Any  
10 place it said "knowingly" in these definitional  
11 instructions you object to. Understood.

12 MR. KELLY: Other than that, no, sir. Nothing  
13 additional.

14 THE COURT: Page 9, Mr. Hughes?

15 MR. HUGHES: Your Honor, other than objections  
16 raised yesterday, I have nothing new for page 9.

17 THE COURT: Just remind me, because I looked  
18 at this a lot yesterday. What -- what instruction?

19 MR. HUGHES: Your Honor, with respect to  
20 paragraphs H and I, the meanings of "substantial  
21 and justifiable risk" and "gross deviation." It's  
22 the state's opinion that as they are written today,  
23 it's far better than they were -- the way they were  
24 yesterday.

25 However, it is the state's belief that

1 because those terms are undefined, it was the  
2 intention of the legislature to leave them to the  
3 common meaning of what a juror would apply. And we  
4 would ask that no definition be provided.

5 THE COURT: And I -- I did look at the  
6 William G. case just to check the language to make  
7 sure that that's what was there. I did remove some  
8 of the language that I thought was somewhat  
9 redundant. I think -- again, this being a case --  
10 there's not other cases like this. There is no  
11 guidance. I think this is a meaningful, important  
12 instruction in this particular case.

13 Mr. Kelly. On H and I at this point?

14 MR. KELLY: Judge, we believe they're  
15 acceptable.

16 THE COURT: As I indicated, they were  
17 modified. There's less language than originally  
18 proposed.

19 Mr. Hughes, did you cover everything else  
20 on 9, then?

21 MR. HUGHES: On 9, yes, sir.

22 THE COURT: Mr. Kelly, as to page 9?

23 MR. KELLY: Nothing additional.

24 THE COURT: Page 10, Mr. Hughes?

25 MR. HUGHES: Your Honor, it's the state's

1 belief that for paragraph 10, under multiple acts,  
2 it refers to acts. The recommended Arizona jury  
3 instruction on that multiple acts includes  
4 bracketed language for act or omission. It's the  
5 state's belief that the "or omission" language  
6 should be included in the -- in that -- in that  
7 proposed instruction.

8 THE COURT: And I want to make clear, this was  
9 an instruction I thought there would be some  
10 discussion on because I could not locate the actual  
11 11 on any of the versions I had. So -- Diane did  
12 obtain it this morning. So I just saw that actual  
13 RAJI this morning.

14 Both sides have requested this  
15 instruction, so it should go in. I agree with that  
16 in some form. But is there -- is there some  
17 agreement on the language that could be put in? I,  
18 basically, used the defense language because that's  
19 what I had to work with.

20 MR. KELLY: Judge, I have no objection to the  
21 language as it -- as it exists in paragraph 10 on  
22 page 10.

23 THE COURT: Mr. Hughes, then, because I didn't  
24 have the RAJI, what -- what are your suggestions,  
25 then?

1 MR. HUGHES: Your Honor, I'd ask the RAJI  
2 language be used and that the instruction read, the  
3 defendant is accused of having committed the crime  
4 of blank in count blank. The prosecution has  
5 introduced evidence for the purpose of showing that  
6 there is more than one act or omission upon which a  
7 conviction on count blank may be based. Defendant  
8 may be found guilty if the proof shows beyond a  
9 reasonable doubt that he committed any one or more  
10 of the acts or omissions.

11 However, in order to return a verdict of  
12 guilty to count blank, all jurors must -- must  
13 agree that he committed the same act or omission or  
14 acts or omissions. It is not necessary that the  
15 particular act or omission agreed upon be stated in  
16 your verdict.

17 Your Honor, that is different in many  
18 respects from the language that the defense had  
19 submitted. We do believe that the RAJI instruction  
20 is appropriate, it should include the omission  
21 language, and it should be in the more neutral term  
22 language that is given in RAJI than the language  
23 that was drafted apparently by the defense.

24 THE COURT: How do you propose dealing with  
25 the fact of multiple counts? You said Count I --

1 and lesser included and those matters, Mr. Hughes?

2 MR. HUGHES: Your Honor, I think with respect  
3 to those counts, the -- the proposed language that  
4 is on page 10 deals with that, committed the crimes  
5 of reckless manslaughter or negligent homicide.  
6 I'm not sure you need to list the counts, quite  
7 honestly. I think it could end at that point.

8 I think the verdict forms and the other  
9 instructions give the count numbers. And so I  
10 think that that would be the appropriate way of  
11 handling it. The defendant is accused of having  
12 committed the crimes of reckless manslaughter or  
13 negligent homicide, period.

14 THE COURT: I would prefer to use the RAJI,  
15 but I -- having not locating mine, I want to be  
16 able to compare it.

17 So, Mr. Kelly --

18 MR. HUGHES: Your Honor, if we could give you  
19 a copy --

20 THE COURT: Can I have that right now, please?  
21 Do you have one, Mr. Kelly?

22 MR. KELLY: I do.

23 THE COURT: Mr. Kelly, anything else with  
24 regard to this? I'm inclined to use the language  
25 out of the RAJI.

1 MR. KELLY: Judge, I think our objection is  
2 clear. We don't believe there should be any  
3 reference to an omission. Thus, I'm going to leave  
4 that to your discretion.

5 However, in regards to the language  
6 proposed by the defense, we worked on this for a  
7 great deal of time in comparison with standard  
8 criminal 11. I believe that it's much more clear  
9 and simple. And, thus, that's why the slight  
10 modifications were proposed to the Court.

11 As an example, the RAJI says, it's not  
12 necessary that the particular act or omission  
13 agreed upon be stated in your verdict. We struck  
14 that as extraneous. We did include this last  
15 sentence, which is a correct statement of law.  
16 It's much more clear. If you cannot unanimously  
17 agree as to what act or omission constituted the  
18 crime, you must find Mr. Ray not guilty of the  
19 alleged crime.

20 We submitted this with all these things  
21 in mind.

22 THE COURT: I want to address the act or  
23 omission. That -- that's part of this now, at  
24 least by the rule. And I think it needs to be in  
25 there.

1 MR. KELLY: And, Judge, we just don't want to  
2 waive our argument that you should not. So we're  
3 leaving that to your discretion.

4 THE COURT: Okay.

5 MR. LI: Your Honor, and I just want to add  
6 one thing that was added, which I think is  
7 necessary here, is the culpable mental state. It  
8 says here -- you know -- however, in order to  
9 return a verdict of guilty, all jurors must agree  
10 that he or she committed the same act with the  
11 culpable mental state. Can't just be some act  
12 without a culpable mental state.

13 THE COURT: You know, in looking at it, if you  
14 put conduct and then referred back because conduct  
15 includes that, that's the other way to do it. It  
16 would be saying act or omission. I think omission  
17 has to be added. And I don't think there are  
18 substantive differences once that's there.

19 Mr. Hughes raised some concern about  
20 whether the last sentence, I think, is phrased in a  
21 more argumentative tone than suggested by the  
22 phrase. But -- yeah. I want to keep the -- I want  
23 to keep the culpable mental act referenced there  
24 with the act or omission. Actually, to be precise,  
25 it should say, voluntary acts or omission, really.

1 But I'm going to add that to culpability  
 2 but probably leave the more neutral sentence in  
 3 with regard to the finding.  
 4 So, Mr. Hughes, I've got --  
 5 MR. HUGHES: Your Honor, if your assistant has  
 6 a copy of RAJI 11.  
 7 THE COURT: I have that. And I just am not  
 8 locating it in the mass of cases and things like  
 9 that.  
 10 Okay. Anything else on 10?  
 11 And then there's some other things that  
 12 we still need to address, though.  
 13 MR. LI: Yes, Your Honor. There is one thing.  
 14 No. 8.  
 15 THE COURT: Okay.  
 16 MR. LI: On the causation, preexisting  
 17 physical condition. It can't just be an injury to  
 18 another. This case is about homicide. So it needs  
 19 to be when a person causes death to another.  
 20 THE COURT: Mr. Hughes?  
 21 MR. HUGHES: Your Honor, may I have moment?  
 22 MR. LI: And -- you know -- just for the  
 23 record, obviously we still object to the  
 24 instruction to the extent that it's given, should  
 25 conform to the charges.

1 THE COURT: Realizing this is from the civil  
 2 area, do you object to it as a misstatement of  
 3 the -- of the law in the civil area?  
 4 MR. LI: No, Your Honor.  
 5 THE COURT: I just want to make clear the  
 6 nature of the objection.  
 7 MR. LI: The objection is that -- that there  
 8 is no evidence that a preexisting physical  
 9 condition had anything to do with this. In fact,  
 10 the evidence is to the opposite. Autopsies did not  
 11 find preexisting physical conditions caused the  
 12 deaths.  
 13 MR. HUGHES: Your Honor, the state has no  
 14 objection to modifying the term from "causes  
 15 injury" to "causes death."  
 16 THE COURT: I will modify that, and the  
 17 instruction will be given.  
 18 Anything else on page 10 from the defense  
 19 or prosecution?  
 20 MR. HUGHES: No.  
 21 MR. KELLY: No, Judge.  
 22 THE COURT: Okay. Then some other  
 23 instructions that were requested. And they  
 24 concern -- we'll look at the state's first. The --  
 25 with regard to the waiver.

1 Mr. Hughes, did you find some authority?  
 2 I tried to find some authority and --  
 3 MR. HUGHES: Your Honor, I didn't. I would  
 4 cite, again, to the general Arizona Revised  
 5 Statutes pertaining to the criminal law.  
 6 ARS 13-103, which abolishes common law defense --  
 7 you know -- common law offenses and affirmative  
 8 defenses.  
 9 And the affirmative defenses, which are  
 10 established by law, are solely contained in  
 11 Chapter 4, Title 13, the justification statute.  
 12 There is no justification for -- to commit an act  
 13 against a person based on their waiver. And we  
 14 believe that instruction is an appropriate  
 15 statement to the law.  
 16 We're concerned the jurors may get back  
 17 into the jury room and read the waivers that  
 18 purport to absolve any liability and believe that  
 19 that waiver is somehow operable in the criminal --  
 20 criminal realm, as opposed to perhaps the civil  
 21 realm where it may have been intended. The  
 22 instruction that's proposed is a correct statement  
 23 of the law and we believe it should be given.  
 24 THE COURT: I understand your concern. But  
 25 what do you think jurors can do with waivers?

1 MR. HUGHES: Your Honor, I think the waivers  
 2 are relevant for the jurors to determine, for  
 3 example, did Mr. Ray know that this conduct could  
 4 cause death. And there is some indications in the  
 5 waiver that the conduct could cause death. And  
 6 that's something that -- it's a matter of argument,  
 7 and obviously I'm sure the defense will argue to  
 8 the contrary.  
 9 But there are reasons why the waivers are  
 10 relevant. But the operative effect of the -- what  
 11 purports to be the language in the waiver absolving  
 12 the defendant of liability is not operating the  
 13 criminal realm. And the jurors need to know that  
 14 those waivers do not absolve anybody of the  
 15 criminal liability.  
 16 MR. KELLY: Judge, we argued this yesterday.  
 17 The purpose of the waivers in this criminal case is  
 18 that they provided notice to the participants of  
 19 the activities and even provided notice to the  
 20 participants of the dangerousness of the  
 21 activities. And the language in those waivers  
 22 includes statements that they voluntarily place  
 23 their signature on it, they read the waiver.  
 24 But I don't think Mr. Li, in his closing  
 25 arguments, is going to stand up and make some civil

1 law argument about the effect of waiver on -- on  
2 civil negligence. That's simply not going to  
3 happen.

4 But what he is going to do, very  
5 consistent with our cross-examination, is after the  
6 state telling you that this was sprung on you in  
7 the last hour, Thursday morning after the Vision  
8 Quest when you're half starved and thirsty that lo  
9 and behold, that's not quite true. You signed a  
10 waiver that said there was going to be a sweat  
11 lodge subject to intense temperatures and confined  
12 spaces, et cetera. So I simply don't think it's  
13 necessary.

14 If we go down the realm of requesting all  
15 these civil instructions, we'd be -- there's an  
16 assumption-of-the-risk aspect. But that's not the  
17 purpose to absolve -- it's not an affirmative  
18 defense, as I mentioned yesterday. It was not pled  
19 as an affirmative defense. We didn't provide  
20 notice of Rule 15 as an affirmative defense.  
21 Simply facts in this case.

22 THE COURT: Mr. Hughes.

23 MR. HUGHES: Your Honor, I think the response  
24 is if the defendant is not arguing that it is an  
25 affirmative defense but the risk is that the jurors

1 will read a document that purports to say it is a  
2 defense, the jurors may come to that conclusion in  
3 the jury room without argument by the attorneys.  
4 It would be something that they could fairly decide  
5 based on reading the evidence.

6 If the defense is not arguing that this  
7 is a defense, there's no harm to the defense in  
8 giving this proposed instruction, which would  
9 alleviate a juror reaching an improper legal  
10 conclusion about the effect of the evidence.

11 THE COURT: Mr. Kelly, you don't need to  
12 address this right now. Because I don't -- I'm not  
13 going to give it as it stands. I think it would be  
14 useful to -- to provide the correct law. But the  
15 way this instruction reads, it could be looked at  
16 as -- it could be just disregarded. I mean, it  
17 even suggests that. It's not a shield. It's --  
18 and I think what I'm hearing are both sides think  
19 it has some evidentiary value potentially. And  
20 that can be a point of argument.

21 But, again, with authority, I -- I think  
22 there should be some guidance on this. I tried to  
23 find some last night, and I wasn't successful. But  
24 it's not a shield -- does not shield a defendant  
25 from criminal liability. I think the jury can do

1 with this what they -- they want. It's not an  
2 automatic by any means. It should not have the  
3 effect thinking, no. That's it. Look at the  
4 waiver. It's over. I understand that concern with  
5 that. And I don't think there should be any  
6 misleading. But I'm not going to give this -- this  
7 instruction the way it's phrased.

8 Then the other suggestion -- one had to  
9 do with vicarious liability. That was toward the  
10 end of the day.

11 And, Mr. Hughes, your argument on that  
12 was -- was really covered by other instructions,  
13 where Mr. Ray -- the defendant's referenced. And  
14 there shouldn't be any confusion that some other  
15 person who's involved somehow would be the real  
16 responsible person but that would be attributed to  
17 Mr. Ray.

18 MR. HUGHES: That's correct, Your Honor. The  
19 other instructions, including the multiple actors  
20 instruction, I think, make it very clear. And the  
21 vicarious liability proposed instruction, if  
22 anything, I think, makes it less clear. And the  
23 state would request that the proposed instruction  
24 not be given.

25 THE COURT: Mr. Kelly, anything else?

1 MR. KELLY: Judge, again, I think it's  
2 important in instructing the jury to look at the  
3 facts that were presented during the trial. And on  
4 numerous occasions, the government, through the  
5 testimony during direct examination, attempted to  
6 impute knowledge to Mr. Ray. And that began with  
7 Melinda Martin and continued through many of the  
8 other volunteers and people closely associated with  
9 James Ray International.

10 And there were repeated objections from  
11 the defense. There were sidebar conferences. And  
12 the implication is that somehow Mr. Ray is  
13 responsible, criminally responsible, for acts of  
14 his employees and volunteers and other participants  
15 and even third persons employed by Angel Valley.

16 And, thus, given that posture that this  
17 case is in, I believe instructing the jury on  
18 vicarious liability because this is a correct  
19 statement of the law. And in a criminal case, it's  
20 necessary for you to distinguish the actual acts,  
21 and, given your rulings, omissions by Mr. Ray, the  
22 individual, from anyone else. And that's what the  
23 proposed jury instructions suggests and does,  
24 Judge.

25 MR. HUGHES: Your Honor, finally the -- the



1 instruction is just plain wrong. It confuses cause  
2 and proximate cause, intervening cause. It  
3 conflicts on its face with the multiple-actor  
4 causation dealing with proximate cause or sole  
5 cause of death. And -- and for that reason alone,  
6 it should not be given.

7 MR. KELLY: Your Honor, just for the record,  
8 if -- if the state is objecting to the principles  
9 of law that are contained in this suggested  
10 instruction, then that's just wrong. It says, you  
11 may not consider as evidence Mr. Ray's guilt based  
12 on James Ray International, the corporation's,  
13 conduct. That's a true statement of the law.

14 And unfortunately, there was a lot of  
15 evidence presented in this case that -- that  
16 blurred that distinction. And -- and I believe  
17 it's important to instruct this jury in that  
18 regard.

19 And so I guess I don't quite  
20 understand -- you know -- what is the harm to the  
21 State of Arizona in providing the jury with a  
22 correct statement of law that they have to find --  
23 they have to apply the facts as they relate to my  
24 client's actions and knowledge and not blur that  
25 with acts, conduct, statements made by JRI, it's

1 employees, volunteers, or others.

2 THE COURT: I've indicated I want the  
3 distinction made. And I suggested an instruction  
4 that was just positive, has to be evidence directly  
5 related to Mr. Ray personally and not to JRI or  
6 other persons or entities, something like that.  
7 Because this implicates agency law, instructing on  
8 agency law -- you know -- various things.

9 And so the -- the way it was phrased,  
10 I think that it's going to be made very clear  
11 through -- through argument that no one is  
12 suggesting that any conduct other than what Mr. Ray  
13 may or may not have been involved in can be  
14 considered. That's -- that's going to be the only  
15 thing that can be argued and presented. And the  
16 instructions say that. Again, if there were a  
17 direct, positive statement about that, I'd be  
18 inclined to give that.

19 MR. KELLY: Well, Judge, perhaps, then, my  
20 request would be to give that first sentence. An  
21 individual cannot be found guilty of a crime for  
22 acts or omissions of a corporation.

23 THE COURT: Mr. Hughes, I -- I -- I want the  
24 distinction clear. I don't -- I don't want there  
25 to be blurring. And I don't want it to be anything

1 other than a neutral statement of what the law is.  
2 Because there is -- there are a number of people  
3 involved. There's been testimony about people  
4 other than Mr. Ray and what they've done or didn't  
5 do. And so I'd like a short, positive statement  
6 that doesn't get into this.

7 Do you have a suggestion.

8 MR. HUGHES: Your Honor, with respect to  
9 dealing with the situation of -- of a statement  
10 informing a jury that the defendant cannot be held  
11 responsible for the acts of a corporation or  
12 another person, the state would not oppose an  
13 instruction like that. Maybe we can work with the  
14 defense over lunch to try and draft one.

15 However, I think when we're giving that  
16 instruction, it would also need to include the  
17 language from 13-306, which is a person is  
18 criminally liable for conduct constituting an  
19 offense when such person performs or causes to be  
20 performed in the name of or on behalf of the  
21 corporation.

22 And the reason being is we all know  
23 corporations are -- are legal fiction. They act  
24 through people. And so if were you to say if  
25 Mr. Ray could not be held liable for the acts or

1 omissions of the corporation, the jury could  
2 assume, well, as long as he was acting on behalf of  
3 the corporation, there would be no criminal  
4 liability for him. That would be in direct  
5 contravention of 13-306.

6 So I think any statement about the  
7 liability for the acts of another would be --  
8 should include a reference to 13-306. The other  
9 way, of course, is just to leave the -- the  
10 instructions as they exist, including the multiple  
11 actors, which does discuss sole, proximate cause  
12 and proximate cause and would allow the jury to  
13 determine whether or not to hold Mr. Ray  
14 responsible for someone else's conduct. I think  
15 that is covered. That's one of the purposes of the  
16 multiple-actors instruction.

17 THE COURT: What's the statutory reference,  
18 Mr. Hughes, that you --

19 MR. HUGHES: 13-306.

20 THE COURT: And that was a concern I had with  
21 this instruction because -- because of agency and  
22 what a juror might think about agency, it could  
23 just be confusing as to who's doing what. And I  
24 was looking for a clear way to sort out.

25 The only thing that counts is the

1 evidence with regard to what Mr. Ray may or may not  
2 have done personally. That's -- that's how I want  
3 it to be presented.

4 MR. KELLY: And, Judge, that's what we agree  
5 with. And if we now -- and, again, I'd argue  
6 estoppel. The government cannot now argue 13-306,  
7 which is criminal liability of an individual for  
8 conduct of an enterprise. Can't do that after the  
9 close of evidence. That would have -- we would  
10 have been required to receive notice of that.

11 So a statement along the lines of the  
12 first sentence in -- in our proposed or perhaps  
13 better drafted and better stated by you just a  
14 moment ago. What we're trying to do is just point  
15 out to this jury that despite many of the  
16 representations made by many of the witnesses, it's  
17 Mr. Ray's conduct that's being evaluated by this  
18 jury. And so -- so we'd object.

19 And I think we talked about piercing the  
20 corporate veil yesterday. You know, imputing  
21 liability based on corporate acts and employees of  
22 the corporation, et cetera. And that's simply not  
23 the factual basis in this particular case. It's  
24 always from day one been that my client is  
25 responsible for conduct.

1 MR. HUGHES: And 13-306 does not impute  
2 liability for someone else's act. It merely makes  
3 it clear if the defendant is acting on behalf of  
4 the corporation, he's still responsible for his own  
5 conduct, his own acts.

6 MR. KELLY: Judge, that's not what it says.

7 THE COURT: Okay. I'm going to have to look  
8 at 13-306. The way I -- I have it now, still  
9 phrased in somewhat of the negative. But an  
10 individual cannot be found guilty of a crime for  
11 the acts or omissions of a corporation or other  
12 person or entity. Something like that.

13 And then I'll look at 13-306. And if it  
14 really is just further clarifying at -- by the same  
15 time, just because a person might be working for a  
16 corporation doesn't mean it's for the corporation.  
17 But if it doesn't add a theory of liability, that's  
18 what I'm going to be looking at on that, Mr. Kelly.

19 MR. KELLY: And the statute has to be read in  
20 its entirety.

21 THE COURT: Well, I will. I will read it.

22 MR. KELLY: It says, a person is criminally  
23 liable for conduct constituting an offense, which  
24 such a person performs or causes to be performed in  
25 the name of or on behalf of an enterprise to the

1 same extent as if such conduct were performed in  
2 such person's own name or behalf. We have not  
3 received any notice that we needed to defend  
4 against that alleged basis of responsibility.  
5 That's never been --

6 THE COURT: I don't -- I don't recall that  
7 statute and thinking of it in terms of a  
8 due-process kind of arguments that were made in the  
9 brief on level of culpable mental state. So  
10 I'll -- I'll look at that.

11 MR. HUGHES: And, Your Honor, I do believe the  
12 statute was cited in our memorandum on the duty  
13 issue. And, again, it's not imposing a new basis  
14 of liability. The indictment makes it clear that  
15 the liability for the defendant was for his own  
16 conduct.

17 This statute merely makes it clear that  
18 the defendant can't shield his conduct if he's  
19 acting on behalf of an enterprise or corporation.  
20 And I think it's critical that that be explained.  
21 Because, again, a corporation can only act through  
22 its employees and officers.

23 There's been testimony that -- that most  
24 everything that Mr. Ray was doing at James Ray  
25 International events was for the corporation of

1 James Ray International. And a juror could believe  
2 that, well, because he's working for the  
3 corporation, I can't hold him criminally  
4 responsible. That's the danger if you give  
5 something along the lines of the first sentence  
6 without the explanation that's provided by 13-306.

7 THE COURT: Well, I'm going to look at 13-306.  
8 And I understand -- I understand the argument. And  
9 it's -- you know -- one thing to say the evidence  
10 has to be just the personal acts.

11 But then, Mr. Li, you're -- you're going  
12 to elaborate on why -- just to clarify -- you  
13 know -- someone -- those personal acts, if they  
14 happened to be in somebody else's or some other  
15 entity's name or on their -- or its behalf, that  
16 would interject something new in the case, and it's  
17 a due process --

18 MR. LI: Yeah. I think there's that problem.  
19 But there's -- there's also the problem that this  
20 statute is dealing with piercing the corporate  
21 veil. I mean, that's -- that's what this is about,  
22 basically. If you -- you -- you know -- sign  
23 checks on behalf of your company but you're  
24 actually benefiting from that, that's what this  
25 statute is intended to deal with.

1 The actual evidence adduced at trial,  
2 which is what's relevant to this case, is that  
3 there were a lot of -- you know -- this was a  
4 company with 27 employees. Everyone had different  
5 roles. And that, for instance, there were -- you  
6 know -- directors of operations and all sorts of  
7 folks who were in charge of things, like getting  
8 first-aid kits and AEDs if that's the thing that  
9 the state says Mr. Ray should have gotten.

10 And the problem with this particular  
11 statute is it -- it's sort of -- it gives with one  
12 hand, which is to say that you can't hold a person  
13 liable for the acts or omissions of -- of a company  
14 because that would be imposing vicarious liability  
15 on somebody for something they didn't do.

16 It gives with that hand but then takes  
17 away by saying, oh, but -- you know -- if he works  
18 for a company, you can consider it if he was doing  
19 it on his own behalf. The problem is there's no  
20 evidence anywhere in this case that Mr. Ray was in  
21 charge of getting first-aid kits, for instance.

22 And -- you know -- Mr. Hughes has made  
23 this statement that on the one hand it would be  
24 absurd for the state to argue that it was first-aid  
25 kits. And yet on the other hand, Mr. Hughes also

1 argues that, well, they should have had AEDs to  
2 defibrillate folks because they were inside the  
3 sweat lodge for 15 minutes, allegedly, before they  
4 came out and missed the golden hour. And so maybe  
5 somebody could have been saved by timely  
6 application of a defibrillator. That's a corporate  
7 issue.

8 And -- and what's happening here is  
9 that -- you know -- the state wants to blur the  
10 lines again. And -- and -- and they can't do that.  
11 And that's the problem with the way they've --

12 THE COURT: You've made that argument that  
13 it's a corporate issue. And -- and the focus,  
14 again, is on what Mr. Ray may or may not have done  
15 and a jury matter to be determined by the jury.  
16 And I don't agree with that statement.

17 Mr. Hughes.

18 MR. HUGHES: And, Your Honor, this is not --  
19 it's not a new theory of liability. From day one  
20 the case has been involving what did Mr. Ray do  
21 during the Spiritual Warrior week. And clearly  
22 everything he was doing there was while he was on  
23 the payroll for Angel Valley.

24 This statute is not a new theory of the  
25 case. It's always been the case -- the state's

1 theory that what Mr. Ray did that week he is  
2 responsible for what he did. And this statute  
3 merely makes it clear if you then tell a jury, but  
4 you can't hold someone responsible for what a  
5 corporation does, then the jury is not getting the  
6 whole side, which is but if the corporation commits  
7 that crime and -- and Mr. Ray is the actor who's  
8 committing it, if they go out and hire someone to  
9 commit a crime, the person who goes out and commits  
10 the crime is not shielded or absolved by liability.  
11 I don't see that as a -- something that would be  
12 controversial in this case.

13 MR. LI: Well, it doesn't need to be -- need  
14 to be instructed that way because it's -- it's just  
15 not a feature of this case that somehow Mr. Ray,  
16 because he was hired by JRI as an employee, somehow  
17 that we're going to argue that because of that,  
18 somehow he's shielded from liability. That's not  
19 the argument.

20 The only point is that he can't be held  
21 liable for what the company did or didn't do. This  
22 just confuses the -- the entire issue of -- of  
23 whether or not Mr. Ray can be held liable for the  
24 conduct of others.

25 THE COURT: Something brand new now put into

1 the instruction. I've not seen a proposed  
2 instruction that -- that -- that deals with it in  
3 the fashion I suggested yesterday. And Mr. Hughes  
4 raises this -- this point. I'm going to look at  
5 13-306.

6 And I think the last matter to discuss is  
7 the First Amendment request. And, again, I  
8 indicated the way this is phrased, I think it would  
9 be very, very confusing to the jury. I understand  
10 the defense has made an extensive record that they  
11 believe there have been First Amendment violations.

12 Mr. Kelly.

13 MR. KELLY: Judge, on the previous issue, I'd  
14 also ask you to take a look at 13-305, criminal  
15 liability of an enterprise. I believe it has to be  
16 read together with 13-306.

17 THE COURT: Okay. What about First Amendment?

18 MR. KELLY: Judge, we had a proposed  
19 instruction. We argued it yesterday. And, again,  
20 it was based on the actual facts presented during  
21 this case and that this -- if I may find it,  
22 Judge -- that the -- simply that you may not  
23 convict Mr. Ray because of the content of his  
24 speech or his ideas.

25 And what we attempted to distinguish

1 yesterday was the -- the speech, which can be  
2 considered for an evidentiary purpose, such as it's  
3 hot, hotter, hotter than you've ever experienced.  
4 Obviously that can be considered in rendering a  
5 verdict.

6 But whether or not Mr. Ray believed in  
7 Holotropic breathing or -- or some aspect of the  
8 Vision Quest or the Samurai Game, it's those areas  
9 which were allowed to be admitted during the last  
10 four months that create the concern in regards to  
11 his First Amendment rights.

12 And -- and that's the concern is  
13 distinguishing those two types of speech. And if  
14 you recall, Judge, we briefed this. We argued it  
15 repeatedly at the sidebar. The government said it  
16 was relevant for some purpose, and yesterday they  
17 said it was not.

18 So we're in a position of instructing  
19 this jury. And if we cannot clarify the  
20 distinction between speech that can be used to  
21 assess criminal conduct and speech that is  
22 protected by the First Amendment, then I would  
23 submit we need to strike all the testimony as it  
24 relates to the latter.

25 Otherwise it has no purpose, unless it's

1 going to be misused by the state that if that  
2 vegetarian diet, that Mr. Ray believed a vegetarian  
3 diet would get somebody a little bit off kilter,  
4 that people were -- had to overcome their vanity  
5 and get a haircut, all that type of speech, and  
6 some of it much, much closer to spiritual or  
7 religious basis. And we believe that this  
8 instruction addresses that.

9 It does not prevent the State of Arizona  
10 to argue the -- what we originally termed to be the  
11 relevance speech. And that is -- if you recall in  
12 estimating the length of time, we were under the  
13 mistaken assumption that the relevant evidence  
14 began to the presweat lodge presentation through  
15 the end of the sweat lodge and the subsequent  
16 medical care.

17 We had no idea four or five days of  
18 testimony -- or excuse me, the preceding four or  
19 five days, which were covered by literally weeks  
20 and weeks of testimony about death angels and  
21 domeos and what you saw in the Vision Quest and --  
22 and what was your purpose of being there,  
23 et cetera, had anything to do with the alleged  
24 crime.

25 But it's now in evidence. And I would

1 submit that either an instruction regarding the  
2 First Amendment is appropriate to allow the jury to  
3 distinguish between those two types of speech or an  
4 instruction from this Court that you will not  
5 consider that speech.

6 MR. HUGHES: Your Honor, the proposed  
7 instruction as prepared would not permit the jurors  
8 to use as evidence in this case anything Mr. Ray  
9 had to say. And that simply is -- is a  
10 misstatement of the First Amendment. It's not what  
11 the Wisconsin versus Mitchell case that I cited  
12 yesterday held. It's not what many of the cases  
13 that are cited in the state's response to the  
14 Rule 20 motion held.

15 The proposed jury instructions contain an  
16 instruction to the jury not to be influenced by  
17 prejudice or sympathy in this case. And the jurors  
18 are going to be presumed to follow that  
19 instruction, not to be prejudiced against Mr. Ray.

20 And this instruction, then, doesn't serve  
21 the purpose of avoiding prejudice. But there's  
22 another instruction that does that. What it does  
23 do is it confuses the idea of the First Amendment,  
24 and it does not allow the use of a person's speech  
25 to be used as evidence against the defendant.

1 As that Mitchell case indicated, the  
2 defendant's declaration or statements are commonly  
3 admitted in criminal trials, provided they're  
4 subject to the evidentiary rules, like relevancy,  
5 reliability, and the like. And this instruction  
6 simply does not -- does not recognize the  
7 permissible uses that the jury can use for those  
8 speech.

9 THE COURT: Mr. Kelly, anything else?

10 MR. KELLY: Judge, I direct your attention to  
11 Mr. Li's opening argument where he is discussing  
12 the state's adults-cannot-choose-for-themselves  
13 theory, that somehow the speech of my client  
14 overcame their free will when they stayed in the  
15 sweat lodge until they died.

16 And we heard weeks and weeks and weeks of  
17 testimony, and then we have proposed experts, which  
18 were precluded by the Court, along the lines of  
19 that theory.

20 And so now, as we stand here today in  
21 June, we have evidence in this case which relates  
22 directly to the First Amendment rights of my  
23 client. And this jury needs to be instructed that  
24 it cannot be considered in assessing whether or not  
25 the state has proved beyond a reasonable doubt each

1 and every element of the alleged crimes. That's  
2 the issue, Judge.

3 Now, we can redraft. But -- but  
4 remember, it was the defense on day one who  
5 objected to all this extraneous evidence relating  
6 to my client's speech and ideas. And now we're in  
7 the position where we had weeks and weeks of  
8 evidence along that regard. And our position is  
9 that we cannot simply just allow the jury to go  
10 back and deal with it however they believe. We  
11 need to instruct them properly.

12 THE COURT: And in bench conferences and in  
13 discussions here in court, other discussions, I  
14 made the ruling that I was going to allow evidence  
15 that showed the context for what happened. And it  
16 all came in in that fashion. And we had  
17 discussions about at what point it would be  
18 cumulative and things like that. I found it to be  
19 relevant. And this instruction, as Mr. Hughes  
20 noted -- noted yesterday, would be terribly  
21 confusing to the jury.

22 MR. LI: Well, we -- we can redraft something.  
23 But there -- there is a difference between a  
24 general injunction to be fair and to not be  
25 prejudiced. And there's a difference between that

1 and a constitutional right, just as if a defendant  
2 chose not to testify, chose not to speak to the  
3 police, didn't open his door to the police when  
4 they knocked on it. There are -- there are  
5 specific constitutional rights that are implicated  
6 by those types of conduct, just as there are  
7 specific constitutional rights related to speech.

8 So as a consequence, it's not enough  
9 simply to say, oh, you got to be fair and -- you  
10 know -- don't -- don't -- don't -- you know --  
11 don't be prejudiced against him. That's a  
12 different set of rights than the right that the  
13 founders gave all of us to free speech and to --  
14 you know -- the Fifth Amendment and the Fourth  
15 Amendment. They gave us those rights.

16 And the problem with the state's position  
17 here is that -- you know -- the jury needs to  
18 understand that they cannot take Mr. Ray's views  
19 and his beliefs and his statements of his  
20 beliefs -- they cannot use that against him. They  
21 have to be told that our constitution doesn't  
22 permit that.

23 And -- and -- and this is the problem  
24 that the state's making. Because -- I understand  
25 that the Court did -- did make some rulings

1 relating to what sorts of -- what speech could come  
2 in. But -- but the state went far and broad with  
3 that, very far and broad with that.  
4 And -- and now we're in a situation  
5 where -- you know -- the fact that Mr. Ray talks  
6 about Toltecs or something like that in one of his  
7 speeches was somehow admissible -- you know -- some  
8 mesoAmerican culture who believes in one thing or  
9 another.

10 The fact that we have -- you know --  
11 angels of death and what have you, all of that,  
12 this is now all relevant in this -- in this sweat  
13 lodge case. And -- and -- and the point is that  
14 the fear -- the alpha and omega. That was  
15 another -- another thing that -- that two separate  
16 witnesses just had to blurt out -- Ms. Hamilton and  
17 Ms. Foster -- about Mr. Ray making some sort of  
18 prayer about -- you know -- alpha and omega.  
19 That's out of the Book of Revelations.

20 And the fact that he's making some sort  
21 of prayer inside of a sweat lodge, that now is --  
22 is perhaps something that the jury has to consider.  
23 They need to be instructed that they cannot  
24 consider that. That's not -- that's not what our  
25 Constitution provided. These are religious and

1 spiritual beliefs. These are not just -- it's not  
2 just speech, like two drug dealers talking to each  
3 other.

4 And we can redraft it, Your Honor.  
5 But -- but we can -- we can try to -- try to  
6 accommodate the fact that -- you know -- the courts  
7 do permit words, a defendant's words, to be used  
8 but they don't allow the belief systems to be  
9 prosecuted.

10 THE COURT: I ruled that there would not be an  
11 understanding of what happened in the sweat lodge  
12 arguably without this background information. Is  
13 there a potential for misuse of some of it? If  
14 there was some way to address that, I would -- I  
15 would want to do that.

16 MR. LI: We can draft --

17 THE COURT: But the problem is there is  
18 arguably a great deal of speech that would be --  
19 not a great deal. There's evidence of speech that  
20 on itself has no criminal implication whatsoever.  
21 It doesn't mean anything in the -- in the criminal  
22 justice context unless it goes along with other  
23 speech and -- and arguably other actions or  
24 omissions.

25 This instruction is a blanket invitation

1 to not look at the admissible speech. And I know  
2 that through the case I tried to make rulings that  
3 would go beyond what might bear on the mind-set,  
4 state of mind, of people participating in the sweat  
5 lodge.

6 If there's -- if there's another  
7 suggestion, it needs to be provided to the state  
8 very rapidly, because I'm going to go in and  
9 paraphrase that. But I said before, and I followed  
10 through on this, we're not going to rush the  
11 instruction conference at this point.

12 Anything else with regard to  
13 instructions?

14 MR. KELLY: Judge, just after listening to  
15 you, then perhaps that's what the instruction  
16 should say, that you may consider speech in the  
17 context of the event and not --

18 THE COURT: I -- I'd like -- I want the state  
19 to see this.

20 MR. LI: If it just said ideas -- you know.  
21 If it just said -- you know -- the First Amendment  
22 of the United States Constitution protects freedom  
23 of speech. You may not convict Mr. Ray because of  
24 the content of his ideas. You may not be  
25 influenced or prejudiced or biased against Mr. Ray

1 because of the content of his ideas.

2 THE COURT: I want people to think about that.  
3 I really need to -- to put the instructions  
4 together.

5 And I'll just say to the state, and I've  
6 mentioned before, there is the possibility of this.  
7 Because of the nature of the evidence, there is a  
8 First Amendment concern that's there. Something to  
9 address, if at all possible.

10 The other part of the instructions,  
11 though, that does address it is the idea that the  
12 actual -- any real evidence that the jury may  
13 determine will be what's used, not these other  
14 things.

15 Mr. Kelly.

16 MR. KELLY: Judge, I just wanted to remind the  
17 Court, we also have a motion that is stated as  
18 defendant's request for an admonition regarding  
19 closing argument.

20 THE COURT: I'll get back to my original list.  
21 I did have that noted as something to discuss.  
22 I've -- I've read that.

23 MR. KELLY: And, Judge, also, if I may, just  
24 have a moment. I'd like to make sure the record is  
25 preserved. One thing I missed on page 6,

1 paragraph C, I believe it is, on motive -- yes.  
2 It's paragraph 6, page C, motive. I would  
3 incorporate my argument yesterday objecting to the  
4 definition of "motive" based on the fact that this  
5 is not an intentional or knowing offense. It's  
6 recklessness, but it has no relevance. And I think  
7 we discussed that extensively yesterday. But I  
8 believe I skipped over that when we were discussing  
9 this page.

10 THE COURT: Based on the evidence in this  
11 case, I'm giving that instruction.

12 Then with regard to the written motion  
13 that came in yesterday --

14 Mr. Hughes, have you seen that.

15 MR. HUGHES: Your Honor --

16 THE COURT: The request for admonition, I  
17 guess.

18 MR. HUGHES: I believe this is a similar topic  
19 that got brought up on Friday. And the Court  
20 reminded the parties of their obligations under  
21 Bible. The state is aware of its obligations under  
22 Bible. We do believe that the -- to the extent  
23 that the motion seeks anything other than that, the  
24 motion should be denied.

25 THE COURT: This relates to something that

1 came up fairly recently. It had to do with the  
2 state's original position that the defense should  
3 not be able to use transcripts. And I -- and I  
4 appreciate that the state provided me a case on  
5 point -- and I thank you for that -- that,  
6 basically, indicated that that can be done. And  
7 that case actually dealt with the prosecution.

8 I just -- and it concerned me at the  
9 time, Mr. Hughes, that the notion that -- that  
10 somehow not having the most accurate accounting of  
11 the evidence would not be preferable to some  
12 attempt at paraphrasing.

13 And because of that I -- in particular I  
14 did take note of the pleading that was filed. And  
15 I am going to urge both parties. And I -- and I --  
16 the arguments have to be grounded in the -- in the  
17 evidence, reasonable inferences. And -- and the  
18 State versus Bible is cited in the -- in that. And  
19 I'm not going to say any more. I'm just assuming  
20 it's going to be followed.

21 MR. LI: Your Honor, one last housekeeping --

22 THE COURT: I think Ms. Polk wanted to address  
23 that.

24 MS. POLK: Your Honor, I did. Just two quick  
25 issues. On the issue of what's appropriate in

1 closing -- closing arguments, I agree that neither  
2 party is supposed to vouch, that it would be  
3 inappropriate to vouch, and that throughout this  
4 trial, not in the presence of the jury but  
5 certainly in court arguments, defense counsel has  
6 done quite a bit of vouching about the fact that  
7 they were prosecutors at one time and they've never  
8 seen a case like this. I would just note that that  
9 is improper vouching as well and would expect that  
10 that sort of vouching not occur either.

11 And then the second issue, Your Honor, is  
12 that Rule 15.4(c) of the Rules of Evidence, it  
13 states that the fact that a witness's name on a  
14 list furnished under this Rule shall not be  
15 commented upon at the trial. As the Court and  
16 counsel know, the state had listed a number of  
17 witnesses. And we whittled down, in the interest  
18 of time, a considerable number of witnesses. I  
19 believe that this Rule would make it inappropriate  
20 for opposing counsel to comment on witnesses who  
21 were not called who were on our list.

22 THE COURT: That's what the rule says, I  
23 believe, Mr. Kelly.

24 MR. LI: I guess if the question is using --  
25 talking about the list. I mean, is that the issue?

1 THE COURT: The fact that someone is on the  
2 list --

3 MR. LI: Right. Doesn't --

4 THE COURT: -- and not -- is not called,  
5 cannot be something --

6 MR. LI: Yeah.

7 THE COURT: -- that the jury is alerted to or  
8 argued. That's understood.

9 MS. POLK: And, Your Honor, finally, counsel  
10 has stipulated to the state's redacted versions of  
11 Exhibits 1018, 1019, and 1020, which are the client  
12 files for the three victims. And what I -- what we  
13 talked about before, Your Honor, was substituting  
14 clean copies for the existing exhibit numbers, if  
15 that's what the Court would still like to do.

16 THE COURT: I would.

17 MS. POLK: Then I'll have them marked. And  
18 then what we've done with respect to James Shore is  
19 we have done a stipulation that he, in fact, paid  
20 this \$9,695. What I'd like to do is staple that  
21 stipulation -- we haven't marked these yet. But  
22 then that stipulation would be stapled to the James  
23 Shore client file if that's okay with counsel.

24 MR. LI: That's fine with us. We -- we need  
25 to just do one look at the actual exhibit. Because

1 I don't think Miriam has had a chance to see them.  
2 But we trust that the state has done what we need  
3 to see.

4 THE COURT: Since -- what I would suggest,  
5 what's anticipated when the jury is reassembled  
6 that the defense is going to rest. And then,  
7 Ms. Polk, I'll address you about rebuttal. I think  
8 that would be the appropriate time just as a means  
9 of getting that evidence admitted. It's not  
10 rebuttal. But you can just say it's been  
11 stipulated by the parties.

12 MR. LI: Your Honor, just as a matter of  
13 housekeeping, at the close of the case, we'd renew  
14 our Rule 20 motion. We would prefer not -- you  
15 know -- we'd like the Court to -- to make its  
16 ruling not in front of -- in the presence of the  
17 jury.

18 THE COURT: Oh, of course. And we can do that  
19 at -- at a break or something.

20 MR. LI: Okay. I just want to have --

21 THE COURT: You don't need to come forward and  
22 do a bench conference on that. You will -- you'll  
23 be given an opportunity, of course.

24 MR. LI: Thank you.

25 THE COURT: I asked the jury 1:15. I'd ask

1 that the parties be back by 1:00.

2 MR. KELLY: Judge, I -- I had another  
3 housekeeping matter. I have a family emergency, an  
4 obligation, tomorrow morning. And I spoke with  
5 Ms. Polk. And I would just believe it be  
6 appropriate for the Court to mention to the jury  
7 that my failure to be present tomorrow is because  
8 of -- and I believe she would prefer language like,  
9 other obligation or family obligation or something,  
10 and not the word "emergency," which -- which is  
11 fine.

12 I just don't want them to imply that I  
13 don't believe that who's ever closing at that point  
14 in time is not important. So I'd make that  
15 request.

16 THE COURT: Something like important family  
17 obligation. Something like that, Ms. Polk?

18 MR. KELLY: Judge, it's a funeral between  
19 10:00 and 12:00 in Chino Valley tomorrow.

20 MS. POLK: That's fine.

21 THE COURT: Anything else?

22 MS. POLK: No, Your Honor.

23 (Recess.)

24 THE COURT: The record will show the presence  
25 of the defendant, Mr. Ray, and the attorneys.

1 And, Counsel, I've put what I feel to be  
2 the appropriate revisions in the instructions. Any  
3 further remarks as to this final set?

4 Mr. Hughes.

5 MR. HUGHES: Your Honor, pertaining to the  
6 First Amendment instruction, the state objects as  
7 it's written. The issue here is the instruction  
8 concentrates on speech that occurred before the  
9 sweat lodge ceremony began but ignores -- by  
10 ignoring, informs the jury that they must ignore  
11 the other effects of the speech during the sweat  
12 lodge ceremony and after the sweat lodge ceremony  
13 may have had on the listener.

14 I'm including comments that were made by  
15 the defendant inside the sweat lodge that the state  
16 believes were actually not just the background but  
17 the actus reus that the defendant was involved in,  
18 that no one can leave, close the door now, bring  
19 "X" number of rocks in. Comments along those lines  
20 are actually actus reus, not offered just for the  
21 purpose of providing context or background.

22 Statement of Frank Barbaro afterwards  
23 regarding Mr. Ray's claim that Ted, or Ted Mercer,  
24 was running the sweat lodge, again, is not a  
25 background but is offered and the state intends to

1 argue it was made for the purposes of concealing  
2 Mr. Ray's role in the event.

3 So the -- the problem here is this  
4 limiting instruction focuses on the speech  
5 beforehand but not on any of the other speech.

6 What I would propose, Your Honor, is the  
7 second -- the first sentence be ended at the words,  
8 "the state has introduced evidence of Mr. Ray's  
9 speech, religious and/or spiritual beliefs and  
10 ideas," period. And then add after that, you may  
11 only consider this evidence for the purpose of  
12 determining context or background to the events in  
13 this case, comma, or for determining defendant's  
14 motive, comma, intent, comma, or the effect the  
15 speech may have had on the listener, period. And  
16 then the remainder of the paragraph, I think, would  
17 be appropriate to give.

18 But I think there needs to be that  
19 addition, which would include the other purposes  
20 that the speech has been offered for.

21 And, Your Honor, that's the language  
22 of -- you can consider it for motive or intent or  
23 for other purposes is supported by that Wisconsin  
24 versus Mitchell, which is the U.S. Supreme Court  
25 case from 1993.

1 THE COURT: Keep the other language in about  
2 you must not be prejudiced by or for against  
3 Mr. Ray after that?

4 MR. HUGHES: Yes, Your Honor. That -- I  
5 believe that's appropriate. I have some  
6 reservations about the statement, the First  
7 Amendment of the United States guarantees every  
8 citizen freedom of speech and -- I think it was  
9 meant to say religion. That's an appropriate  
10 statement.

11 However, I think the common understanding  
12 of jurors may be different about the extent of the  
13 First Amendment's protection that the Supreme Court  
14 has provided guidance over the last -- you know --  
15 200-and-some years. And so the jurors -- who knows  
16 how they're going to take that statement.

17 But in an effort to move on, Your Honor,  
18 and get these instructions to the jury, with the  
19 proposed modification to the -- what would,  
20 essentially, be the first sentence, the state would  
21 have no objection to the giving of the --

22 THE COURT: Mr. Kelly, there are -- there are  
23 other purposes that it could be used for arguably  
24 legally. But do you have a position?

25 MR. KELLY: Judge, I believe that's going to,

1 essentially, gut the purpose of providing this  
2 instruction to the jury. I did not write down a  
3 proposed change, so forgive me if I misstate it.

4 But, essentially, I believe what  
5 Mr. Hughes -- could be interpreted from Mr. Hughes'  
6 suggested instruction is that the jury could  
7 consider evidence of my client's religious beliefs  
8 to prove motive.

9 THE COURT: Is that the gist of it,  
10 Mr. Hughes?

11 MR. HUGHES: Your Honor, not the religious  
12 beliefs but the speech. Perhaps the -- perhaps the  
13 instruction could say, you may not consider  
14 evidence of speech -- of Mr. Ray's speech for any  
15 purpose other than determining.

16 THE COURT: Why --

17 MR. KELLY: Judge, a more simple way perhaps  
18 to instruct the jury and explain this difficulty is  
19 by including the word "certain" before evidence.  
20 The state has introduced certain evidence of, and  
21 then allow the parties in the closing to argue  
22 that -- you know -- some of his speech may relate  
23 to the alleged criminal conduct.

24 But then also the jury would understand  
25 that if that speech were protected by the First



1 Amendment or related to spiritual beliefs, they  
2 could rely on this instruction.

3 MR. HUGHES: And, again, the problem there,  
4 Your Honor, is the jury is going to be left with  
5 the bulk of the instruction, which limits what they  
6 can consider it for and does not notify the jurors,  
7 as the First Amendment allows, that speech can be  
8 used for determining motive, intent, or the effect  
9 on the listener.

10 MR. LI: The one thing it can't do, though,  
11 and this is something that Mr. Hughes said, is --  
12 is be used for the actus reus unless the strict  
13 First Amendment guidelines under Brandenburg and  
14 the other cases are followed. That's -- that's  
15 the -- the main problem with the -- the  
16 government's case.

17 Ms. Polk herself has said that the speech  
18 cannot form the corpus of the crime. Mr. Hughes  
19 now just said it can. And the problem is you can't  
20 sort of -- you can't halfway this. I mean, the  
21 reality of it is that the reason why speech or  
22 religious beliefs have purportedly been introduced  
23 into this case is to provide background, not to  
24 form the actus reus. And if it is here to form the  
25 actus reus, then you have the problem of

1 Brandenburg because there are specific rules about  
2 when speech can be considered to have caused  
3 somebody to do something. When is the actus reus?  
4 Incitements or riots, those sorts of things, Your  
5 Honor.

6 MR. HUGHES: And, Your Honor, I believe the  
7 limitation, which is -- that I proposed, which is  
8 in keeping with the Mitchell case, limiting it to  
9 determining context or background of the events or  
10 determining the defendant's motive, intent, or the  
11 effect the speech may have on the listener  
12 satisfies all of the concerns that are raised by  
13 the various Supreme Court cases dealing with  
14 speech.

15 Again, speech is -- as was recognized in  
16 Mitchell, is commonly admitted in criminal trials.  
17 Every time you have a burglar -- or a robbery, for  
18 example, where there's a demand for money, speech  
19 is forming part of the actus reus.

20 In this case, the speech, which controls  
21 the amount of rocks that come in, which controls  
22 when the door is opened by the Mercers or outside,  
23 that is affirmative conduct, that speech by  
24 Mr. Ray. And it's appropriate for the jury to  
25 consider the effect that speech had on the

1 listeners.

2 MR. LI: What if you just moved -- the state  
3 has introduce certain evidence that Mr. Ray's  
4 religious and/or spiritual speech, beliefs, and  
5 ideas? I mean, it is obviously true that you  
6 can -- you can prosecute somebody for words, if  
7 they're not the typical First Amendment type word.

8 The problem with this case is that the  
9 state has continually tried to prosecute Mr. Ray  
10 for First Amendment activity.

11 And so I think if you move the word  
12 "speech" to before "beliefs," then you would be  
13 protecting the First Amendment and avoiding the  
14 issue that Mr. Hughes apparently is concerned  
15 about.

16 THE COURT: Mr. Hughes.

17 MR. HUGHES: Your Honor, that still  
18 neglects -- the instruction as read would not allow  
19 the jury to consider it for determining motive,  
20 intent, or the effects on the listener. And that's  
21 what needs to be in that instruction if they're  
22 going to be told you cannot consider it for any  
23 other purpose.

24 THE COURT: I'm not going to give it. There  
25 is no -- it's not being addressed. So I'm not

1 going to give it.

2 MR. LI: And, Your Honor, we would ask what --  
3 for the Court's guidance for -- this is an  
4 important issue. We would ask the Court's guidance  
5 to what would the Court want to make this --

6 THE COURT: Well, what may sound like a  
7 religious belief or expression for somebody could,  
8 in fact, have other aspects to it. And the state  
9 is trying to cover this and acknowledge that.

10 And, Mr. Li, you're repeating your  
11 argument that this is a prosecution based on speech  
12 or religious beliefs. And I've made the rulings I  
13 have throughout. So --

14 MR. LI: We appreciate --

15 THE COURT: We're not anywhere close to some  
16 kind of agreement. It's just it -- it cannot be  
17 limited to just what's stated there.

18 MR. LI: So then --

19 THE COURT: Other than that, then we have to  
20 rely on the jury following the instructions and  
21 knowing there's got to be really a cause of the  
22 deaths and it meets the -- the statute and they're  
23 not going to be swayed by an improper consideration  
24 of other evidence in the case that has to do with  
25 in part perhaps religious and spiritual speech and

1 beliefs.

2 MR. LI: Then what if we worked with what  
3 Mr. Hughes suggested, which is -- you know -- the  
4 state has introduced certain of Mr. Ray's speech  
5 and religious or spiritual beliefs, period? You  
6 may consider this for the purpose of providing  
7 context, background, alleged incidents. And what  
8 was -- what was the other language?

9 MR. HUGHES: My proposed language was  
10 religious and/or spiritual beliefs and ideas for  
11 any purpose other than determining context or  
12 background to the events in this case or for  
13 determining defendant's motive, intent, or the  
14 effect the speech may have on the listener, period.

15 You may not consider this evidence for  
16 any other purpose, which is -- would be the next  
17 sentence and then otherwise as written.

18 MR. LI: Your Honor, obviously we maintain our  
19 objections. I understand the Court's desire to  
20 move things forward.

21 THE COURT: Well, Mr. Li, Mr. Hughes,  
22 Mr. Kelly, I think one thing that can go in there  
23 is really the last two sentences anyway.

24 MR. KELLY: I agree, Judge. The purpose --  
25 the jury instruction is a correct statement of the

1 law, which then a jury, based on the facts that it  
2 determines to be true, applies the law. That's  
3 what we're attempting to do.

4 My response there a moment ago in regards  
5 to motive, we object that there's -- there can't  
6 even be a motive when we have a culpable mental  
7 state of recklessness or negligence. So that --

8 THE COURT: I don't mean to interrupt.

9 Intent came back into three that -- I  
10 know that it's not meant in terms of there's an  
11 offense here charged with an intent, but that what  
12 perhaps was intended by Mr. Ray. The state wants  
13 to argue what was intended by mentioning these  
14 beliefs and -- and ideas and certain context that  
15 might motivate persons a certain way.

16 MR. LI: Your Honor --

17 THE COURT: That's what -- that's how intent  
18 is meant there, but --

19 MR. LI: Let's keep this simple. Let's just  
20 say what the First Amendment provides and strike  
21 the first two sentences and call it a day.

22 THE COURT: That's what I just proposed.

23 MR. LI: And I -- I -- we would accept that.

24 MR. HUGHES: And, Your Honor, my concern there  
25 if you limit it to the First Amendment of the

1 United States and Constitution guarantees every  
2 citizen freedom of speech and religion, period.  
3 Thus you must not be prejudiced or biased against  
4 Mr. Ray simply because you disagree or dislike the  
5 content of Mr. Ray's speech, and I think it should  
6 say religion and/or spiritual beliefs or ideas.

7 Again, it's a correct statement.  
8 However, the jury does not -- is not likely to  
9 understand that the Supreme Court in Mitchell and a  
10 long line of cases before that have ruled that  
11 speech can be used in criminal proceedings to  
12 determine motive or intent or the effect on the  
13 listener.

14 I think if you left the final sentence,  
15 which doesn't reference the First Amendment and the  
16 baggage that may be in jurors' minds as to what  
17 that means or doesn't mean, just give the last  
18 sentence, I wouldn't have a problem with that as a  
19 stand-alone.

20 But when you -- when you say "guarantees  
21 freedom of speech," basically, period, that leaves  
22 for the jurors to determine, well, does freedom of  
23 speech mean we can't use any of his speech against  
24 him? And then we're back in the same boat we were  
25 just in.

1 MR. LI: Your Honor, we're not in the same  
2 boat. But I just note for the record letter E  
3 about the constitutional right not to testify  
4 references the Constitution. These are  
5 constitutional rights, and the -- the jurors need  
6 to understand.

7 MR. HUGHES: I agree they do need to  
8 understand. There is a difference between an  
9 absolute right not to testify and the First  
10 Amendment, which governs speech and has created  
11 a -- a winding road, if you will, of what is  
12 protected speech and what is criminal speech and  
13 what is not protected speech.

14 MR. KELLY: Judge, if I may. This is so  
15 simple. If you simply read what the law is, the  
16 last two sentences, then just like every other jury  
17 instruction, the attorneys are entitled to argue  
18 it. And no one has been misled.

19 And as you've drafted the proposed  
20 instruction and as Mr. Li just outlined, the last  
21 two sentences clearly state what the constitutional  
22 protection is. And they should be apprised of  
23 that. What the respective sides choose to do with  
24 that particular instruction is up to them. And all  
25 the arguments Mr. Hughes is making and Ms. Polk can

1 make in her closing.

2 MR. LI: And one last thing, Your Honor. The  
3 instruction says you may not be prejudiced or  
4 biased. It doesn't say you can't consider the  
5 speech, you can't do any -- it says you can't be  
6 prejudiced or biased for or against.

7 MR. HUGHES: And I have no opposition to that  
8 final sentence. It's -- it's when you throw in the  
9 term "First Amendment," well, what does that mean?  
10 And do jurors understand that our Supreme Court has  
11 carved out an area that is not -- is not protected  
12 by the First Amendment when it deals with judging  
13 speech for purposes of evidentiary purposes, the  
14 motive, intent, effect on the listener?

15 THE COURT: I was thinking about another  
16 sentence, adding a phrase indicating you may  
17 consider the evidence for a proper purpose but you  
18 must not be prejudiced or biased. I don't know how  
19 much that does, but it alerts them to the fact that  
20 the speech in itself could not be off limits. I  
21 think it's accomplished by how limited that last  
22 sentence is.

23 It's the idea that -- that there may be  
24 speech here and you just can't -- can't use that as  
25 a reason to be prejudiced or biased. And it

1 certainly can be argued around that, that that  
2 instruction, that's all it's about, is not being  
3 prejudiced or biased, that this is why this speech  
4 is relevant, it's to a proper purpose. Something  
5 like that. I'll give the last -- the last two  
6 sentences. That was my initial thought.

7 MR. HUGHES: Your Honor, would you add in,  
8 then, the sentence, you may consider this evidence  
9 for a proper purpose?

10 THE COURT: It's appropriate. The question is  
11 going to be what's our proper purpose? You know,  
12 with the First Amendment, we probably could have  
13 instructions as long as these instructions to -- to  
14 go through the -- the First Amendment. And if  
15 you're -- you don't have this in a case where you  
16 have these kinds of considerations normally. It  
17 doesn't involve extensive statements by people and  
18 lectures and talks. I'm -- I'm going to give the  
19 last two sentences. Okay.

20 And then I'll just state now, it's very  
21 important -- well, I'm going to listen to the  
22 arguments. There are things courts can do if  
23 arguments go awry in terms of instruction, so I'll  
24 be attentive to that. But I'm going to give the  
25 last two sentences.

1 I'm not giving the vicarious liability.  
2 You probably noticed that, at least not -- it would  
3 seem to me that there would need to be an  
4 instruction to cover all of the concerns and -- and  
5 both sides object. So I want to make sure you both  
6 filed your proposed instructions. I want to make  
7 sure you've done that so there's a record what you  
8 suggested. But I'm not going to give that.

9 Any other record on the instruction?

10 MR. KELLY: There is, Judge. It's a clerical  
11 error on the verdict form.

12 THE COURT: Okay.

13 MR. KELLY: I believe that should read  
14 "foreperson."

15 THE COURT: You know, to be consistent, you  
16 did actually note at the very end I talk about  
17 "foreman" and -- have they changed the rule? The  
18 reason I've always gone with "foreman" is the rule  
19 still says "foreman." And I don't -- I don't  
20 really have a problem.

21 When I read instructions because of that,  
22 because I follow the rule that way, I explain that  
23 that's a gender-neutral term, and I say it every  
24 time. But if you -- if you want to have it  
25 "foreperson," if that's how it's done. I don't

1 have an issue with that.

2 MR. KELLY: Judge, we'll leave it to your  
3 discretion. However, at a minimum an explanation  
4 that this is not an implication that a man has to  
5 be a foreman.

6 THE COURT: Mr. Hughes.

7 MR. HUGHES: Your Honor, the state takes no  
8 position on that. "Foreman" is a term of art  
9 that's been around, I think, for longer than this  
10 country has been around. I don't -- I don't have  
11 any opposition if you want to label it  
12 "foreperson," "foreman," or "lead juror," however  
13 you want to call it.

14 THE COURT: I'm going to make very clear to  
15 them it's a gender-neutral term, of course.  
16 That's -- that's what I've done. But I'll -- I'll  
17 change that at some point.

18 MR. HUGHES: And, Your Honor, one final issue,  
19 which has to do with the proposed verdict form for  
20 Count II.

21 THE COURT: Okay.

22 MR. HUGHES: The name on the verdict form says  
23 "Lizbeth Neuman." The name on the indictment says  
24 "Elizabeth Neuman" with an "E" before the "L." The  
25 evidence that's been induced at trial, which is

1 Exhibit 364, her death certificate, indicates a  
2 first name of "Lizbeth" as is indicated in the  
3 verdict form.

4 And I wanted to bring that discrepancy,  
5 first of all, to the Court's attention to the  
6 extent that it requires that I would move under  
7 Rule 13.5 to amend the indictment to correct  
8 that -- that technical defect of the missing "E" --  
9 or the "E" that is there but should be missing.

10 MR. KELLY: We have no objection to amending  
11 the indictment if that's the motion.

12 THE COURT: It's -- it's granted, the motion  
13 to make that technical clerical correction.

14 Do you think there needs to be an  
15 explanation somehow to the -- to the jury because  
16 of that?

17 MR. HUGHES: I don't believe so.

18 THE COURT: I think that can be something that  
19 can be mentioned if either the parties -- it  
20 mentions the count, the counts were read. Okay.

21 I really don't want to rush at this  
22 point, seriously. I know the jury is waiting and  
23 we need to be mindful of that. But we've dealt  
24 with a number of fairly difficult matters.

25 Anything else, Mr. Hughes?

1 MR. HUGHES: No, Your Honor.

2 THE COURT: Mr. Kelly.

3 MR. KELLY: No, sir.

4 THE COURT: Okay. Then, Counsel, the only  
5 thing I'm going to do to change the instruction is  
6 going to be just reduce the First Amendment to the  
7 last two sentences.

8 Do you need another copy of this? I'll  
9 just have copies made. But it's quite a process to  
10 get all the copies to the jurors and everybody. It  
11 takes a while.

12 (Recess.)

13 (Proceedings continued in the presence of  
14 jury.)

15 THE COURT: The record will show the presence  
16 of the defendant, Mr. Ray, the attorneys, the jury.

17 Good afternoon, ladies and gentlemen.  
18 And -- and thank you from all of us for your  
19 patience.

20 And at this time, Mr. Kelly.

21 MR. KELLY: Your Honor, the defense rests.

22 THE COURT: All right. The defense has  
23 rested.

24 Ms. Polk, any rebuttal?

25 MS. POLK: Your Honor, at this time the state

1 would offer into evidence Exhibit 1018, which is  
2 the James Ray International client file pertaining  
3 to Liz Neuman; Exhibit 1019, which is the James Ray  
4 International client file pertaining to James  
5 Shore, and 1020, the James Ray International client  
6 file pertaining to Kirby Brown.

7 THE COURT: Okay. The three numbers, 10 --  
8 MS. POLK: 1018, 1019, and 1020.

9 THE COURT: Thank you. Any objection?

10 MR. KELLY: No objection.

11 THE COURT: Okay.

12 By stipulation 1018, -19, and -20 are  
13 admitted.

14 (Exhibits 1018, 1019, 1020 admitted.)

15 THE COURT: Anything further?

16 MS. POLK: Your Honor, the state rests.

17 THE COURT: Okay. Thank you.

18 Ladies and gentlemen, the state has  
19 rested. The parties have both rested. So at this  
20 time I will be reading the final instructions to  
21 you. And I'd ask that you please pass in all of  
22 the preliminary instructions -- I see you're doing  
23 that now -- and Ms. Rybar will give you all copies  
24 of the final instructions.

25 And while she's doing that, I'll remind

1 you that, as I indicated at the start with the  
2 preliminary instructions, you're going to be able  
3 to take your copies with you into deliberation. So  
4 you don't need to take notes about what I'm saying.  
5 I'll be reading these. You can read along if you  
6 wish or listen.

7 And while she's doing that too, I'll note  
8 that there's one instruction, the very last one,  
9 11, closing instruction, that isn't technically  
10 going to apply today. That's going to be something  
11 to apply when you actually go to deliberate.

12 The closing arguments are going to start  
13 here in a short time, but they will continue to  
14 tomorrow. So what's said in that No. 11 isn't  
15 going to really apply until the -- all the evidence  
16 has been completed.

17 But all of the arguments have to be  
18 complete, and then I will actually submit the case  
19 to you. That's not going to happen today, so I  
20 want to make that clear. And I'll remind you of  
21 that when we get to that last instruction. I'm not  
22 even going to read that No. 11 to you because  
23 that -- that applies when the closing arguments are  
24 completed.

25 So does everybody have a -- looks like

1 you do.

2 Final instructions to the jury: Ladies  
3 and gentlemen of the jury, you have now heard all  
4 the evidence in this case. This is the point in  
5 the case where I will tell you the law you are to  
6 follow in considering this case and reaching your  
7 decision.

8 This is called instructing you on the  
9 law. And you must follow the law as I give it to  
10 you. Please listen carefully to my instructions  
11 and don't try to take notes since you have all been  
12 given copies of these instructions, which you will  
13 take to the jury room with you.

14 You must take into account all my  
15 instructions on the law. You are not to pick out  
16 one instruction or part of one and disregard the  
17 others. However, after you have determined the  
18 facts, you may find that some instructions do not  
19 apply. You must then consider the instructions  
20 that do apply and decide the case by applying those  
21 instructions to the facts as you have found them.

22 It is your duty as a juror to decide this  
23 case by applying these jury instructions to the  
24 facts as you determine them. You must follow these  
25 jury instructions. They are the rules you should

1 use to decide this case.

2 It is your duty to determine what the  
3 facts are in the case by determining what actually  
4 happened. Determine the facts only from the  
5 evidence produced in court. When I say "evidence,"  
6 I mean the testimony of witnesses and exhibits  
7 introduced in court.

8 You should not guess about any fact. You  
9 must not be influenced by sympathy or prejudice.  
10 You must not be concerned with any opinion that you  
11 feel I have about the facts. You, as jurors, are  
12 the sole judges of what happened.

13 Credibility of Witnesses: In deciding  
14 the facts of this case, you should consider what  
15 testimony to accept and what to reject. You may  
16 accept everything a witness says or part of it or  
17 none of it.

18 In evaluating testimony you should use  
19 the tests for truthfulness that people use in  
20 determining matters of importance in everyday life,  
21 including such factors as the witness's ability to  
22 see or hear or know the things the witness  
23 testified to; the quality of the witness's memory;  
24 the witness's manner while testifying; whether the  
25 witness had any motive, bias or prejudice; whether

1 the witness was contradicted by anything the  
2 witness said or wrote before trial; whether the  
3 witness was granted immunity by law enforcement or  
4 by other evidence, and the reasonableness of the  
5 witness's testimony when considered in the light of  
6 the other evidence. Consider all the evidence in  
7 the light of reason, common sense, and experience.

8 Witness Prior Conviction: You have heard  
9 evidence that a witness has previously been  
10 convicted of a criminal offense. You may consider  
11 this evidence only as it may affect the witness's  
12 believability.

13 Expert Witness: A witness qualified as  
14 an expert by education or experience may state  
15 opinions on matters in that witness's field of  
16 expertise and may also state reasons for those  
17 opinions. Expert opinion testimony should be  
18 judged just as any other testimony. You are not  
19 bound by it. You may accept it or reject it in  
20 whole or in part, and you should give it as much  
21 credibility and weight as you think it deserves,  
22 considering the witness's qualifications and  
23 experience, the reasons given for the opinions, and  
24 all the other evidence in the case.

25 Evidence to be Considered: You are to

1 determine what the facts in the case are from the  
2 evidence produced in court. If the Court sustained  
3 an objection to a lawyer's question, you must  
4 disregard it and any answer given. Any testimony  
5 stricken from the court record must not be  
6 considered.

7 Lawyers' Comments Are Not Evidence: In  
8 their opening statements and closing arguments, the  
9 lawyers talk to you about the law and the evidence.  
10 What the lawyers say is not evidence, but it may  
11 help you to understand the law and the evidence.

12 Direct and Circumstantial Evidence:  
13 Evidence may be direct or circumstantial. Direct  
14 evidence is the testimony of a witness who saw,  
15 heard, or otherwise observed an event.  
16 Circumstantial evidence is the proof of a fact or  
17 facts from which you may find another fact.

18 The law makes no distinction between  
19 direct and circumstantial evidence. It is for you  
20 to determine the importance to be given to the  
21 evidence, regardless of whether it is direct or  
22 circumstantial.

23 Absence of Other Participant. The only  
24 matter for you to determine is whether the state  
25 has proved the defendant guilty beyond a reasonable

1 doubt. The defendant's guilt or innocence is not  
2 affected by the fact that another person or persons  
3 are not on trial now.

4 Testimony of Law Enforcement Officers:

5 The testimony of a law enforcement officer is not  
6 entitled to any greater or lesser importance or  
7 believability merely because of the fact that the  
8 witness is a law enforcement officer. You are to  
9 consider the testimony of a peace officer just as  
10 you would the testimony of any other witness.

11 I now want to instruct you on some  
12 general principles of law, which you must apply to  
13 this case.

14 Indictment is Not Evidence: The state  
15 has charged Mr. Ray with three counts of  
16 manslaughter. These charges are not evidence  
17 against the defendant. You must not think that the  
18 defendant is guilty just because of a charge.

19 Mr. Ray has pled not guilty. This plea  
20 of not guilty means that the state must prove each  
21 element of the charges beyond a reasonable doubt.

22 Separate Counts: Each count charges a  
23 separate and distinct offense. You must decide  
24 each count separately on the evidence with the law  
25 applicable to it, uninfluenced by your decision on

1 any other count. You may find that the state has  
2 proved beyond a reasonable doubt, all, some, or  
3 none of the charged offenses. Your finding for  
4 each count must be stated in a separate verdict.

5 Evidence of Any Kind: The state must  
6 prove guilt beyond a reasonable doubt with its own  
7 evidence. Mr. Ray is not required to produce  
8 evidence of any kind. The decision on whether to  
9 produce any evidence is left to the defendant  
10 acting with the advice of his attorney. The  
11 defendant's failure to produce any evidence is not  
12 evidence of guilt.

13 Lost, Destroyed, or Unpreserved Evidence:

14 If you find that the state has lost, destroyed, or  
15 failed to preserve evidence whose contents or  
16 quality are important to the issues in this case,  
17 then you should weight the explanation, if any,  
18 given for the loss or unavailability of the  
19 evidence. If you find that any such evidence is  
20 inadequate -- excuse me. I'm going to read that  
21 sentence again.

22 If you find that any such explanation is  
23 inadequate, then you may draw an inference  
24 unfavorable to the state, which in itself may  
25 create a reasonable doubt as to the defendant's

1 guilt.

2 Constitutional Right Not To Testify: The  
3 state must prove guilt beyond a reasonable doubt  
4 based on the evidence. A defendant in a criminal  
5 case has a constitutional right to not testify at  
6 trial, and the exercise of that right cannot be  
7 considered by the jury in determining whether a  
8 defendant is guilty or not guilty.

9 Presumption of Innocence, Reasonable  
10 Doubt: The law does not require a defendant to  
11 prove innocence. Every defendant is presumed by  
12 law to be innocent. You must start with the  
13 presumption that the defendant is innocent.

14 The state has the burden of proving  
15 Mr. Ray guilty beyond a reasonable doubt. This  
16 means the state must prove each element of each  
17 charge beyond a reasonable doubt. In civil cases  
18 it is only necessary to prove that a fact is more  
19 likely true than not true or that its truth is  
20 highly probable.

21 In criminal cases such as this, the  
22 state's proof must be more powerful than that. It  
23 must be beyond a reasonable doubt. Proof beyond a  
24 reasonable doubt is proof that leaves you firmly  
25 convinced of the defendant's guilty. There are

1 very few things in this world that we know with  
2 absolute certainty, and in criminal cases the law  
3 does not require proof that overcomes every doubt.

4 If, based on your consideration of the  
5 evidence, you are firmly convinced that Mr. Ray is  
6 guilty of the crimes charged, you must find him  
7 guilty. If, on the other hand, you think there is  
8 a real possibility that Mr. Ray is not guilty, you  
9 must give him the benefit of the doubt and find him  
10 not guilty.

11 Jury Not To consider Penalty: You must  
12 decide whether Mr. Ray is guilty or not guilty by  
13 determining what the facts in the case are and  
14 applying these jury instructions. You must not  
15 consider the possible punishment when deciding on  
16 guilt. Punishment is left to the Judge.

17 First Amendment: The First Amendment of  
18 the United States Constitution guarantees every  
19 citizen freedom of speech and religion. Thus, you  
20 must not be prejudiced or biased for or against  
21 Mr. Ray simply because you may or may not disagree  
22 or dislike the contents of Mr. Ray's speech,  
23 religious, and/or spiritual beliefs and ideas.

24 As I go through the balance of these  
25 instructions, I will -- I will be explaining

1 elements of the charges to you. In addition,  
 2 certain words or phrases will be defined for you.  
 3 If I do not provide a definition or explanation of  
 4 any particular word or phrase, you should apply the  
 5 ordinary meaning of such word or phrase in reaching  
 6 your decision.

7 Stipulations: The lawyers are permitted  
 8 to stipulate that certain facts exist. This means  
 9 that both sides agree those facts do exist and are  
 10 part of the evidence.

11 Motive: The state need not prove motive,  
 12 but you may consider motive or lack of motive in  
 13 reaching your verdict.

14 Manslaughter: The State of Arizona has  
 15 charged Mr. Ray with three counts of manslaughter.  
 16 The crime of manslaughter requires proof that the  
 17 defendant, one, caused the death of another person  
 18 and, two, was aware of and showed a conscious  
 19 disregard of a substantial and unjustifiable risk  
 20 that his conduct would cause another person's  
 21 death.

22 The risk must be such that disregarding  
 23 it was a gross deviation from the standard of  
 24 conduct that a reasonable person would observe in  
 25 the situation.

1 "Conduct" (Defined): "Conduct" means an  
 2 act or omission and its accompanying culpable  
 3 mental state.

4 "Voluntary Act" (Defined): "Voluntary  
 5 act" means a bodily movement performed consciously  
 6 and as a result of effort and determination:

7 Omission (Defined): "Omission" means the  
 8 failure to perform an act as to which a duty of  
 9 performance is imposed by law.

10 The only duty you may consider in this  
 11 case is whether the defendant has violated the  
 12 manslaughter statutes or, if appropriate, negligent  
 13 homicide statutes as defined in these instructions.

14 Lesser Included Offense: The crime of  
 15 manslaughter includes the lesser offense of  
 16 negligent homicide. You may consider the lesser  
 17 offense of negligent homicide if either, one, you  
 18 find the defendant not guilty of manslaughter or,  
 19 two, after full and careful consideration of the  
 20 facts, you cannot agree on whether to find the  
 21 defendant guilty or not guilty of manslaughter.  
 22 You cannot find the defendant guilty of negligent  
 23 homicide unless you find that the state has proved  
 24 each element of negligent homicide beyond a  
 25 reasonable doubt.

1 Negligent Homicide: The crime of  
 2 negligent homicide required proof that the  
 3 defendant, one, caused the death of another person  
 4 and, two, failed to recognize a substantial and  
 5 unjustifiable risk that his conduct would cause the  
 6 death of another person. The risk must be such  
 7 that the failure to perceive it is a gross  
 8 deviation from what a reasonable person would  
 9 observe in the situation.

10 The distinction between manslaughter and  
 11 negligent homicide is this: For manslaughter, the  
 12 defendant must have been aware of a substantial and  
 13 unjustifiable risk and consciously disregarded the  
 14 risk that his conduct would cause death. Negligent  
 15 homicide requires that the defendant failed to  
 16 recognize a substantial and unjustifiable risk that  
 17 his conduct would cause death.

18 If you determine that the defendant is  
 19 guilty of either manslaughter or negligent homicide  
 20 but you have a reasonable doubt as to which it was,  
 21 you must find the defendant guilty of negligent  
 22 homicide.

23 "Criminal Negligence" (Defined):  
 24 "Criminal negligence" means, with respect to a  
 25 result or a circumstance described by a statute

1 defining an offense, that a person fails to  
 2 perceive a substantial and unjustifiable risk that  
 3 the result will occur or that the circumstance  
 4 exists.

5 The risk must be of such nature and  
 6 degree that the failure to perceive it constitutes  
 7 a gross deviation from the standard of care that a  
 8 reasonable person would observe in the situation.

9 Included Mental States, Criminal  
 10 Negligence: If the state is required to prove that  
 11 the defendant acted with criminal negligence, that  
 12 requirement is satisfied if the state proved that  
 13 the defendant acted knowingly or recklessly.

14 Including Mental State, Recklessly: If  
 15 the state is required to prove that the defendant  
 16 acted recklessly, that requirement is satisfied if  
 17 the state proves that the defendant acted  
 18 knowingly.

19 "Knowingly" (Defined): "Knowingly" means  
 20 that a defendant acted with awareness of or belief  
 21 in the existence of conduct or circumstances  
 22 constituting an offense. It does not mean that a  
 23 defendant must have known the conduct is forbidden  
 24 by law.

25 "Recklessly" (Defined): "Recklessly"

1 means that a defendant is aware of and consciously  
2 disregards a substantial and unjustifiable risk  
3 that his conduct will result in death. The risk  
4 must be of such -- the risk must be such that  
5 disregarding it is a gross deviation from what a  
6 reasonable person would do in the situation.

7 Meaning of "Substantial and Unjustifiable  
8 Risk." In civil cases a defendant can be liable if  
9 the risk of harm caused by his conduct is merely  
10 unreasonable. In criminal cases the standard is  
11 higher. The risk of death must be substantial and  
12 unjustifiable.

13 Meaning of "Gross Deviation." A gross  
14 deviation from the standard of conduct is one that  
15 may be characterized by such terms, among others,  
16 as flagrant, extreme, outrageous, heinous, or  
17 grievous. The deviation from reasonable conduct  
18 must be significantly greater than the mere  
19 inadvertence or heedlessness that is sufficient for  
20 civil negligence.

21 Causation Instruction: Superseding,  
22 Intervening Events: For conduct to be the cause of  
23 a result, there must be proof beyond a reasonable  
24 doubt that all three -- there must be proof beyond  
25 a reasonable doubt of all three of the following:

1 1. But for the conduct, the result in  
2 question would not have occurred; and

3 2. The relationship between the conduct  
4 and the result satisfies any additional causal  
5 requirements imposed by the definition of the  
6 offense.

7 The additional causal requirements  
8 imposed by the definition of the offense are as  
9 follows:

10 A. For manslaughter, Mr. Ray must have  
11 engaged in the conduct with the mental state  
12 designated recklessly.

13 B. For the lesser included offense of  
14 negligent homicide, Mr. Ray must have engaged in  
15 the conduct with the mental state of criminal  
16 negligence.

17 And, 3, the conduct must be the proximate  
18 cause of the result.

19 The proximate cause of a death is a cause  
20 which in the actual and continuous sequence  
21 produces death and without which the death would  
22 not have occurred. Proximate cause does not exist  
23 if the chain of natural facts either, one, does not  
24 exist or, two, is broken by a superseding,  
25 intervening event that was unforeseeable by the

1 defendant and, with the benefit of hindsight, may  
2 be described as abnormal or extraordinary. The  
3 state must prove beyond a reasonable doubt that a  
4 superseding, intervening event did not cause the  
5 death.

6 Causation Instruction -- Causation  
7 Instruction, Preexisting Physical Condition: When  
8 a person causes death to another, the consequences  
9 are not excused nor is the criminal responsibility  
10 for the resulting death lessened by the preexisting  
11 physical condition of the person killed.

12 Causation Instruction, Multiple Actors:  
13 The unlawful acts of two or more people may combine  
14 to cause the death of another. If the unlawful act  
15 of the other person was the sole, proximate cause  
16 of death, the defendant's conduct was not a  
17 proximate cause of the death. If you find that the  
18 defendant's conduct was not a proximate cause of  
19 the death, you must find the defendant not guilty.

20 Multiple Acts: Mr. Ray is accused of  
21 having committed the crimes of reckless  
22 manslaughter or negligent homicide in Counts I, II,  
23 III. The prosecution has introduced evidence  
24 seeking to prove that there is more than one act or  
25 omission upon which a conviction on Counts I, II,

1 III may be based.

2 You may not find Mr. Ray guilty unless  
3 the proof shows beyond a reasonable doubt that he  
4 committed one or more of the acts or omissions  
5 alleged as to each count. Furthermore, in order to  
6 return a verdict of guilty as to any of the counts,  
7 all 12 jurors must agree that Mr. Ray committed the  
8 same act or omission with the accompanying culpable  
9 mental state.

10 Ladies and gentlemen, we're getting there  
11 to No. 10, the closing instruction. Again, I'll  
12 make very clear that does not apply today at all.  
13 That does not apply until the case is actually  
14 submitted to you when the closing arguments are  
15 complete, which should be tomorrow.

16 So I'm going to skip 11 and look at the  
17 very last page in the paragraph that begins, all 12  
18 of you, and I'm going to start.

19 All 12 of you must agree on a verdict on  
20 each count you consider. All 12 of you must agree  
21 with the -- all 12 of you must agree whether the  
22 verdict is guilty or not guilty.

23 When you go to the jury room, you will  
24 choose a foreman, who will be in charge during your  
25 deliberations and who will sign any verdict that



1 you reach.

2 You will be given three forms of verdict  
3 on which you will indicate your decision. The  
4 verdict forms read as follows: And, ladies and  
5 gentlemen, you will not have those verdict forms.  
6 You will not have those until you go to deliberate  
7 and the case is actually submitted to you. I have  
8 them and they're right here. And they're in a  
9 different color. And that's -- that's for a  
10 reason, so that they -- you'll be able to find them  
11 and keep track of them easily.

12 And I'm going to go ahead and read the  
13 verdict forms to you at this time as well. All  
14 three of the verdict forms are -- are captioned:  
15 In the Superior Court of the State of Arizona, in  
16 and for the County of Yavapai; State of Arizona,  
17 plaintiff, versus James Arthur Ray, defendant, then  
18 the case and cause number.

19 And the first form reads: Verdict  
20 Count I: We, the jury, duly empaneled and sworn in  
21 the above-entitled action and upon our oaths, do  
22 find the defendant, James Arthur Ray, on the  
23 offense of manslaughter as a result of the death of  
24 Kirby Brown as follows: And then a very important  
25 instruction here, mark one box only. First box,

1 not guilty; second box, guilty; the third box,  
2 unable to agree.

3 Then there are some very important  
4 instructions that say, if you find the defendant  
5 guilty of manslaughter, do not complete the next  
6 portion of the verdict form. In other words,  
7 complete this portion only if you find the  
8 defendant not guilty of manslaughter or you are  
9 unable to decide.

10 And then on the next page, we, the jury,  
11 duly empaneled and sworn in the above-entitled  
12 action and upon our oaths, do find the defendant,  
13 James Arthur Ray, on the offense of negligent  
14 homicide as a result of the death of Kirby Brown as  
15 follows: Again, mark one box only. First box, not  
16 guilty; second box, guilty.

17 Then this has to be signed. The -- the  
18 form has to be signed. It says, the above is the  
19 unanimous finding of the jury. It says, signed,  
20 foreman, the jury number. And then foreman print  
21 name.

22 And I'm going to stress that's the term  
23 that's used commonly, but, of course, that's a  
24 gender-neutral term. You can put "foreperson"  
25 there if you prefer to think of it that way.

1 But then there is the signature line and  
2 place for the signature and number for the foreman  
3 or foreperson.

4 And then Verdict, Count II. Again, the  
5 caption. And it reads: We, the jury, duly  
6 empaneled and sworn in the above-entitled action  
7 and upon our oaths, do find the defendant, James  
8 Arthur Ray, on the offense of manslaughter as a  
9 result of the death of Liz Neuman as follows:  
10 Again, mark one box only. And there's three: Not  
11 guilty, guilty, unable to agree.

12 And then says, if you find the defendant  
13 guilty of manslaughter, do not complete the next  
14 portion of the verdict form. In other words,  
15 complete this portion only if you find the  
16 defendant not guilty of manslaughter or you are  
17 unable to decide.

18 And then the instruction, we, the jury,  
19 duly empaneled and sworn in the above-entitled  
20 action and upon our oaths, do find the defendant,  
21 James Arthur Ray, on the offense of negligent  
22 homicide as a result of the death of Liz Neuman as  
23 follows: Mark one box only. First box, not  
24 guilty; second box, guilty. Again, the above is  
25 the unanimous finding of the jury, and a place for

1 the signature, juror number, et cetera, place to  
2 print as well.

3 And then, finally, in the Superior Court  
4 of the State of Arizona, in and for the County of  
5 Yavapai, caption again, Verdict Count III. And it  
6 reads: We, the jury, duly empaneled and sworn in  
7 the above-entitled action and upon our oaths, do  
8 find the defendant, James Arthur Ray, on the  
9 offense of manslaughter as a result of the death of  
10 James Shore as follows: Again, mark one box only.  
11 First box, not guilty; second box, guilty; third  
12 box, unable to agree.

13 And then the instruction, as the others,  
14 if you find the defendant guilty of manslaughter,  
15 do not complete the next portion of the verdict  
16 form. In other words, complete this form only if  
17 you find the defendant not guilty of manslaughter  
18 or you are unable to decide.

19 And then, again, the instruction on  
20 page 2: We, the jury, duly empaneled and sworn in  
21 the above-entitled action and upon our oaths, do  
22 find the defendant, James Arthur Ray, on the  
23 offense of negligent homicide as a result of the  
24 death of James Shore as follows: Mark one box  
25 only. Not guilty. Second box, guilty. The above

1 is the unanimous finding of the jury. Again, place  
2 for signature, foreman, juror number and the final  
3 line for the printing of the name of the foreman or  
4 foreperson.

5 Do counsel have any additions or  
6 corrections to the instructions or the verdict  
7 forms as read.

8 From the state?

9 MS. POLK: No, Your Honor.

10 THE COURT: Mr. Li?

11 MR. LI: No, Your Honor.

12 THE COURT: Thank you.

13 And then at this time, ladies and  
14 gentlemen, the attorneys will be permitted to  
15 provide their closing arguments.

16 Are you ready to proceed, Ms. Polk?

17 MS. POLK: I am, Your Honor. Thank you.

18 Three people are dead who should not be  
19 dead. Three families have lost loved ones who  
20 should not be gone. Three people are dead because  
21 of the conduct and the actions of this man, James  
22 Ray. They are dead because he intentionally used  
23 heat to create an altered state, and he was  
24 criminally reckless about the consequences.

25 To use the words of the manslaughter

1 statute, they are dead because James Ray  
2 consciously disregarded a substantial and  
3 unjustifiable risk that his conduct would cause  
4 death. And that is why he is guilty of three  
5 counts of manslaughter.

6 I want to talk to you a little bit first  
7 about the elements of manslaughter. And these are  
8 in your instructions. To find Mr. Ray guilty of  
9 manslaughter beyond a reasonable doubt, you must  
10 answer four questions in the affirmative. Did the  
11 defendant cause the deaths of Kirby Brown, James  
12 Shore, and Liz Neuman? Did Mr. Ray's conduct pose  
13 a substantial and unjustifiable risk of death? Was  
14 the defendant aware and did he consciously  
15 disregard that risk? And was Mr. Ray's disregard  
16 of the risk a gross deviation from the standard of  
17 conduct that a reasonable person would observe in  
18 that situation?

19 You're also given the option of finding  
20 the defendant guilty of the less serious offense of  
21 negligent homicide. The only difference between  
22 manslaughter and negligent homicide is the issue of  
23 awareness.

24 For manslaughter, you must find that the  
25 defendant was aware and consciously disregarded the

1 risk of death his conduct created. For negligent  
2 homicide, you must find that he failed to perceive  
3 the risk of death created by his conduct.

4 For either crime, it's the same four  
5 questions. Did the defendant cause the deaths?  
6 Did his conduct pose a substantial and  
7 unjustifiable risk of death? Did he consciously  
8 disregard the risk? That's the manslaughter.

9 Or did he fail to perceive the risk --  
10 that would be the less serious offense of negligent  
11 homicide -- and was his conduct a gross deviation  
12 from the standard of conduct a reasonable person  
13 would observe in that situation?

14 I'm going to start with the first two  
15 questions. Did the defendant cause the death of  
16 Kirby Brown, James Shore, and Liz Neuman? And did  
17 his conduct create a substantial and unjustifiable  
18 risk of death?

19 You've heard testimony that the  
20 defendant's heat-endurance challenge, his version  
21 of a sweat lodge ceremony, came at the end of a  
22 five-day event for which he charged about \$10,000  
23 per person. It consisted of crowding approximately  
24 56 people together in that enclosed, tight,  
25 superheated space for more than two hours.

1 You heard Dawn Gordon testify about how  
2 she sat in the back part of that tent, shoulder to  
3 shoulder with no room at all, and how she couldn't  
4 take it when Sean Ronan, who was in front of her  
5 closer to the pit, leaned back against her legs.

6 Now, this drawing by Dawn Gordon that she  
7 made during her testimony is very useful because it  
8 gives us some good positions in the back part of  
9 the tent that got so heat -- so hot. It gives you  
10 a good idea of where Kirby and James were, where  
11 Mark Rock was, where Dawn was, in the zone back  
12 there. Nobody pretended this was to scale. And,  
13 in fact, you know it isn't.

14 When you look at this exhibit, you can  
15 see that Mr. Ray, the defendant's, position is  
16 correctly by the door. But you also see the size  
17 of this pit. And that gives you an idea that  
18 nobody intended this particular diagram to be to  
19 scale.

20 In the briefing that you heard during  
21 this trial, you heard the defendant tell the  
22 participants how he was going to pack them in. And  
23 I want you just to hear a little bit of that clip  
24 right now so you get an idea of what it was like to  
25 have 56 people in that space.

1 And in this photograph, take a look at  
2 the cars. And that gives you a pretty good idea of  
3 how small that sweat lodge really was and how  
4 crowded it was to have 56 people in there and that  
5 the defendant knew that's what he was doing. And  
6 that's what this clip will show you.

7 (Audio played.)

8 MS. POLK: Mr. Ray prepared the participants  
9 all week long for this heat event. By his own  
10 admission, his conduct and the activity of the week  
11 were intended to and did, in fact, wear  
12 participants down. In his words, to get them less  
13 grounded so that they could have that altered  
14 experience.

15 Now, I'm going to play some of the  
16 defendant's statements for you throughout my  
17 closing argument to you. I don't want you to  
18 consider these clips in isolation. I want you to  
19 consider these clips now in the full context of  
20 this trial, in the full context of what you heard  
21 witnesses say from the stand, and in the full  
22 context of what you now know from Sunday, the  
23 beginning, through Thursday.

24 You'll have the audio when you go back to  
25 deliberate. It's right here, Exhibit 741. And it

1 has Mr. Ray's entire briefing for the participants  
2 before they went in the sweat lodge. And I  
3 encourage you to listen to that audio again and  
4 again. Listen to it in the context of what you  
5 know now.

6 What I'm going to do is play a few of the  
7 clips here and there, not out of context, but in  
8 context now, within the context of what you learned  
9 in this trial.

10 He intentionally, by his own words,  
11 throughout the events of the week wore them down so  
12 that they would be less grounded so that they could  
13 have an altered experience.

14 (Audio clip played.)

15 MS. POLK: Uncontested trial testimony  
16 established that for many of the participants the  
17 events of the week, including the sweat lodge, were  
18 a surprise. Many witnesses testified by the time  
19 they entered the sweat lodge they were tired,  
20 hungry, exhausted, mentally weak, fully conditioned  
21 to follow the defendant's directions and that they  
22 trusted he would keep them safe.

23 As Laurie Gennari testified, she said  
24 certainly everything we did was all about getting  
25 an order to do something uncomfortable and doing

1 it. We were well-trained by the end of the week.  
2 The head-shaving event, in which both Kirby and  
3 James Shore participated, was symbolic of playing  
4 full on. The code of silence and the Samurai Game  
5 taught participants and the victims to obey the  
6 defendant and that there are consequences for your  
7 teammates if you disobey him.

8 The Vision Quest, 36 hours without food  
9 or water and confinement to a small circle,  
10 reinforced following the defendant's instructions  
11 in order to get the most from the event. It also  
12 without a doubt weakened the physical state of both  
13 Kirby and James as they entered the defendant's  
14 heat event without relief in the back of the tent.

15 Several witnesses testified that when a  
16 participant did not play full on, she was publicly  
17 chasti -- chastised. And here's that clip.

18 (Audio played.)

19 MS. POLK: You heard from several witnesses  
20 about how the defendant emphasized all week that  
21 participants should allow others to have their own  
22 experience and to let them have their own journey,  
23 and how he taught them to ignore their own  
24 instincts to reach out and help somebody in  
25 distress. Several witnesses testified as to why

1 inside that tent they did not stop the heat event.

2 Beverly Bunn, the dentist from Texas,  
3 when cross-examined about why she didn't stop the  
4 ceremony, testified, you learn through the course  
5 of the week that you don't question Mr. Ray on  
6 anything.

7 And Mike Olesen, the businessman from  
8 Canada, testified, I was concerned about everybody,  
9 he said. In hindsight I wondered if I shouldn't  
10 have done something different, but I wasn't running  
11 the show. He told you that if not for Mr. Ray's  
12 temper, he might not have waited as long as he did  
13 to help others get out. I don't think it would  
14 have been a good idea, he told you, to disrupt the  
15 ceremony. "He," meaning Mr. Ray, doesn't like it  
16 when people interrupt the process.

17 And Dennis Mehravar, another businessman  
18 from Canada, was questioned by Mr. Li whether  
19 Dennis would have saved someone who was dying. And  
20 Dennis, remember his testimony, said, if it was a  
21 normal day and someone is hurt, of course I would  
22 save someone who's dying. But in that tent I was  
23 in pain. I don't know if I could.

24 And remember how Mr. Li pressed him on  
25 the point and asked him, well, what if you knew the

1 person next to you was dying? Remember Dennis's  
2 response? I probably would wait until the round  
3 was over and ask for help. I wouldn't have stopped  
4 the ceremony.

5 Almost every witness testified that they  
6 trusted and believed the defendant would keep them  
7 safe as they participated in this ultimate  
8 heat-endurance challenge inside that tent and that  
9 they believed if something happened that they would  
10 be taken care of.

11 Stephen Ray, who passed out, you will  
12 recall he was seated between the 3:00 to 6:00  
13 position. He passed out during the ceremony and  
14 was dragged out afterwards and helicoptered up to  
15 Flagstaff. He testified that his trust in Mr. Ray  
16 was the only thing that allowed him to believe he  
17 could survive the rigors of the sweat lodge.

18 Part of the reason I went in there  
19 knowing how uncomfortable I was, he said, was that  
20 I truly trusted my knowledge of how much control he  
21 had over everything and that he wouldn't let anyone  
22 get hurt.

23 Witnesses testified how they were  
24 influenced by their financial investment of \$10,000  
25 to stay in the superheated environment in hopes of

1 achieving this breakthrough that is exactly what  
2 the defendant marketed to the participants for  
3 their \$10,000.

4 While participants who were conscious and  
5 able to move were arguably free to leave at least  
6 between rounds, not during the round, many  
7 participants were unable to do so by reason of  
8 their altered mental status, which is the hallmark  
9 of heat stroke, as Dr. Dickson and other doctors  
10 testified. Many testified they were in an altered  
11 mental status, not thinking clearly, weak, hot, and  
12 in a self-survival mode.

13 You'll recall the testimony of Linda  
14 Andresano, the nurse from Tucson, who testified how  
15 messed up her thinking was inside the sweat lodge.  
16 She told you that the defendant had said, we'll  
17 play full on. So I played full on by not leaving  
18 the tent. She said she was thinking about the  
19 theme of death from the week. I was trying to be  
20 honorable by staying, she testified. I felt this  
21 was an honorable way to die.

22 The last thing she thought about before  
23 passing out sometime around the sixth round was,  
24 it's a good day to die. Linda told you, if I had  
25 been in my right mind, I would have gotten out of

1 there. I don't know why I didn't leave. If I had  
2 been thinking professionally, I never would have  
3 allowed me to do what I did.

4 Some witnesses testified how strongly  
5 influenced by the defendant they were to stay  
6 despite their growing distress. Dennis Mehravar  
7 testified that the defendant yelled at people who  
8 left, like a drill sergeant, you're more than that.  
9 You're better than that, that those words affected  
10 his ability to leave the tent and that he repeated  
11 those words to himself inside the tent, eventually  
12 passing out sometime around the fifth round.

13 And Sean Ronan testified that he and  
14 James Shore stood in line together before entering  
15 the tent. You recall Sean saying that one of the  
16 things that James Shore said to Sean as they lined  
17 up outside to go in was how James Shore was really  
18 looking forward to the lodge and sitting up in  
19 front because he knew we were going to be doubled  
20 up. Because he, meaning James Shore, always had a  
21 fear of doing that, so this was going to be a  
22 chance for him to break through that fear.

23 This is a photo of the area where Kirby  
24 Brown sat. You remember the testimony of Beverly  
25 Bunn that that is Kirby's tobacco pouch that she

1 made.

2 And here's what we know about Kirby's  
3 frame of mind as she entered the sweat lodge: And  
4 we know that the defendant knew this too because  
5 this is the statement that Kirby made on Thursday  
6 after she had come off of the Vision Quest during  
7 an open-mic session shortly before entering the  
8 defendant's heat-endurance challenge.

9 (Audio played.)

10 MS. POLK: So determined was Kirby Brown to  
11 learn what she thought Mr. Ray had to teach that  
12 for five hours during that Samurai Game she laid  
13 there without moving. Mr. Ray knew that. He knew  
14 the influence that he had on Kirby and others  
15 because Kirby and others took the open mic and made  
16 statements like that shortly before they all went  
17 into his heat-endurance challenge.

18 Witness after witness in this trial has  
19 testified how they trustified (sic) Mr. Ray's  
20 assurances that they could make it through all the  
21 rounds and that it was safe to ignore their body's  
22 signs of distress.

23 Dennis Mehravar, who passed out, again,  
24 inside around the fifth round, testified he  
25 believed that Mr. Ray knew better than Dennis

1 himself, and that Mr. Ray told him, if you don't  
2 believe in yourself, believe in me, meaning  
3 Mr. Ray. My faith will overshadow your doubts.  
4 Dennis thought that Mr. Ray knows what I can  
5 accomplish better than I know myself.

6 At least one participant, Dawn Gordon,  
7 testified she understood the sweat lodge event  
8 could cause death but trust -- trusted that the  
9 defendant would keep her safe inside. It seems  
10 that the defendant wants you to believe that this  
11 is merely a corporate event that he just shows up  
12 for.

13 But we've produced for you the corporate  
14 filings to show you what -- who is the president of  
15 JRI? It's James Ray. Who is the secretary of JRI?  
16 It's James Ray. Who is the treasurer of JRI? It's  
17 James Ray. Who is the director of JRI? It's James  
18 Ray. And who signed this annual filing but the  
19 defendant.

20 Mr. Kelly drew a diagram -- let me see if  
21 I can find it -- couple of diagrams actually  
22 through witnesses, I believe, trying to suggest  
23 that somehow that Mr. Ray's way up at the top and  
24 not responsible for what happened in the sweat  
25 lodge. We recall two diagrams again putting

1 Mr. Ray way up at the top.

2 There is no question that the defendant's  
3 conduct caused the deaths, and there is no question  
4 that Mr. Ray controlled every single aspect of that  
5 heat-endurance challenge. Mr. Ray chose to hold  
6 the heat event at Angel Valley. Mr. Ray controlled  
7 how many people he crammed into the tent. The  
8 defendant controlled the number of rounds. The  
9 defendant controlled the length of each round.  
10 Mr. Ray controlled how long the door was open  
11 between rounds.

12 The defendant controlled the number of  
13 rocks that came in for each round. He controlled  
14 how much water came in and how much hot steam he  
15 was able to create. He controlled how much heat  
16 could escape and how much fresh air came in by how  
17 long he left the door open between rounds.

18 He controlled when people could talk  
19 inside the sweat lodge, and he even controlled when  
20 they could urinate. Mr. Ray controlled when people  
21 could leave, which was only between rounds, not  
22 during a round; and he controlled when people could  
23 not leave. And, finally, Mr. Ray controlled when  
24 this heat challenge finally came to an end.

25 That is undisputed. This evidence is

1 undisputed that Mr. Ray controlled every single  
2 aspect of that heat-endurance challenge, that thing  
3 that he called a "sweat lodge ceremony." It's also  
4 undisputed that he intended to use the heat in the  
5 tent to create an altered experience. He intended  
6 to use the heat to create this altered mental  
7 status in order to give the participants something  
8 extreme to make them think that they got their  
9 money's worth.

10 MR. LI: Your Honor, I am going to object. It  
11 is disputed.

12 MS. POLK: The state does not contend that the  
13 defendant intended for anyone to die.

14 THE COURT: Overruled.

15 MS. POLK: But we do contend that Mr. Ray  
16 recklessly caused their deaths and that he intended  
17 to take the participants up to the edge of death so  
18 that they could have a near-death experience.

19 Remember what the defendant said to  
20 Dennis Mehravar after the event was over. The  
21 scene, according to witnesses, looked like a  
22 M.A.S.H. unit. Dennis Mehravar testified that the  
23 defendant came over to him and helped him get up.  
24 And Dennis said James, I think I died. And  
25 remember what Mr. Ray replied? Do you remember

1 what he said? According to Dennis, the defendant,  
2 with a smile on his face, said, you were reborn.  
3 Go take a shower and get cleaned up.

4 The state does not have to prove beyond a  
5 reasonable doubt how the victims died. We do have  
6 to prove beyond a reasonable doubt that the  
7 defendant caused their deaths. So don't go back to  
8 deliberate and think you all have to agree, for  
9 example, that it was heat stroke or hyperthermia,  
10 the debate that the two medical examiners had. You  
11 don't have to agree on that.

12 What you do have to agree beyond a  
13 reasonable doubt is that the defendant's conduct  
14 caused their deaths.

15 Having said that, there is no question  
16 that the victims died of heat stroke or heat  
17 exposure. All of the doctors in this case, except  
18 the defense doctor, testified it is their  
19 conclusion that the three victims died as a result  
20 of heat stroke or exposure to the heat.

21 Dr. Dickson, the state's expert who  
22 reviewed all the medical records and examined all  
23 these other possible causes of death, such as  
24 toxins or organophosphates, unequivocally testified  
25 that all three victims died of heat stroke.

1 Dr. Mosley and Dr. Lyon, the medical  
2 examiners who performed the autopsies, determined  
3 the cause of death to be heat stroke for Kirby  
4 Brown and James Shore, and Liz Neuman, multiple --  
5 multisystem organ failure due to hyperthermia due  
6 to prolonged sweat lodge exposure, in other words,  
7 the heat tent.

8 All the doctors -- Dr. Lyon; Dr. Mosley;  
9 Dr. Cutshall, the doctor from Flagstaff Medical  
10 Center, and Dr. Dickson, as you saw, were  
11 aggressively cross-examined; but all maintained  
12 their original conclusion that the heat caused the  
13 deaths of Liz, of Kirby, and of James.

14 Yes. Three of them then agreed  
15 hypothetically they could not rule out  
16 organophosphates due to some overlapping symptoms.  
17 But here's the problem with hypothetical questions:  
18 Hypothetical questions ask the witness to ignore  
19 the actual evidence and assume that if something  
20 else were true, then what would their answer be.  
21 You must look at the evidence and only the evidence  
22 in determining whether the defendant is guilty.

23 Dr. Dickson, the only doctor who  
24 treated -- who has ever treated organophosphate  
25 poisoning, would not even hypothetically allow that

1 organophosphates could have caused the deaths in  
2 this case.

3 The defense wants you to freeze your  
4 knowledge in time to what the first responders and  
5 the doctors knew that night, a night when no one  
6 imagined that anyone would intentionally subject  
7 others to searing heat and humidity for more than  
8 two hours and ignore those who lay unconscious in  
9 his tent.

10 What we and you now have is the benefit  
11 of full knowledge of that big picture. You are not  
12 in the same position as those first responders  
13 scrambling for information that night and making  
14 their best efforts to figure out what happened.

15 The state has clearly proven both that  
16 but for the defendant's conduct, Kirby, James, and  
17 Liz would not have died; and something "called  
18 proximate cause," which is in your instructions on  
19 page 9, that the defendant's conduct in its natural  
20 and continuous sequence caused their deaths.

21 The state must prove beyond a reasonable  
22 doubt that a super -- superseding, intervening  
23 event did not cause the deaths. That question,  
24 again, in your jury instructions, is whether there  
25 is some intervening event that was both

1 unforeseeable by the defendant and, without the  
2 benefit of hind -- hindsight, may be described as  
3 abnormal or extraordinary. That sounds like a lot  
4 of legalese.

5 In plain English, here's what this means:  
6 Is there some event outside Mr. Ray's control that  
7 caused the deaths of Kirby, Liz, and James? For  
8 example, if during this event while he's holding  
9 his heat challenge, a boulder on the cliffs above  
10 rolls off and lands on that sweat lodge and kills  
11 three people, well, that wouldn't be Mr. Ray's  
12 fault. And that would be a superseding intervening  
13 event.

14 But if you find that some unforeseeable  
15 event, like a boulder rolling off the cliff, did  
16 not cause their deaths and that but for the  
17 defendant's conduct the victims would not have died  
18 and that his conduct in its natural and continuous  
19 sequence caused the deaths, then you must find  
20 Mr. Ray guilty.

21 This issue of superseding event is where  
22 the hours and hours of testimony and  
23 cross-examination in this case comes in.

24 The defense wants you to believe that  
25 something other than this heat that is right in

1 front of your eyes, something other than this  
2 lengthy exposure to searing heat and humidity in a  
3 crowded tent caused the deaths of the three  
4 victims.

5 Their list of possible causes of death  
6 reads a bit like a take-out menu from an expensive  
7 diner. And it's baloney. It's all baloney.  
8 Organophosphates; rat poison; ant poison that  
9 Mr. Li bought at Home Depot, brought it in this  
10 courtroom, paraded in front of all of you, even  
11 though there is no evidence that that product was  
12 ever out at Angel Valley -- weed killer, tainted  
13 water, tainted fruit, fruit with flies, soil with  
14 pesticides, the tarps, the wood, the wrong wood,  
15 the wood with nails, the wood without nails,  
16 treated wood, pressure-treated wood, wood sealer,  
17 free will, the victims chose to stay in the tent,  
18 and finger pointing, that Rotillo the landscaper on  
19 his own and apparently at his own expense,  
20 purchased some deadly toxin, sprayed it at the site  
21 just before the ceremony but didn't get sick  
22 himself, or that the Mercers built the sweat lodge  
23 wrong, and the very short-lived other cause defense  
24 that Mr. Ray tried to pull on Sergeant Barbaro that  
25 Ted was the one running the sweat lodge. It's

1 ridiculous.

2 The defendant wants you to ignore what is  
3 right in front of your eyes, this prolonged  
4 exposure to unbearable heat in a crowded tent with  
5 searing steam, signs of distress all around the  
6 defendant that people were seriously suffering,  
7 that he acknowledges in the tent yet continues to  
8 add more rocks, more water, producing more heat and  
9 more steam.

10 They want you to ignore problems in past  
11 years that Mr. Ray when he conducts his heat event  
12 had, whether it was in that same structure or in a  
13 different structure. No problems in the same  
14 structure when someone other than Mr. Ray  
15 facilitates a sweat lodge ceremony. No evidence of  
16 any chemicals at Angel Valley that have -- that  
17 could have caused these deaths.

18 And, finally, they want you to ignore the  
19 waiver that Mr. Ray made everyone sign that,  
20 essentially, acknowledges that the way Mr. Ray does  
21 his sweat lodge is dangerous.

22 I'm going to review with you for just a  
23 few minutes the medical testimony, but so much of  
24 this is good old common sense. The Judge has read  
25 to you the instructions for you to follow in this

1 case, and you'll see on page 2 under B where it  
2 says, Credibility of Witnesses, and in that second  
3 paragraph it says, consider all of the evidence in  
4 the light of reason, common sense, and experience.

5 Fortunately when you became jurors in  
6 this case, you didn't have to check your common  
7 sense and your experience at the door. You get to  
8 take that with you when you deliberate just as you  
9 got to have it with you throughout the testimony in  
10 this trial.

11 You have seen that the defense put the  
12 state in the position, essentially, of trying to  
13 disprove a negative long after the fact. They  
14 hired an expert who came up with a cause of death,  
15 as you have heard, 14 months after the deaths and  
16 just before this case was going to trial,  
17 organophosphates. Something that coincidentally  
18 could only be tested for within hours or within the  
19 first few days of its absorption because it  
20 dissipates so quickly.

21 So here is where your common sense and  
22 experience comes in. You heard Dr. Mosley testify  
23 that there are thousands of organophosphate  
24 compounds. And in this case Dr. Mosley said the  
25 only likely ones would be pesticides, and

1 pesticides are probably not a reasonable source of  
2 toxicity.

3 The fact of the matter is if we had  
4 tested for and eliminated organophosphates, they  
5 would have come up with some other substance,  
6 plutonium perhaps, that we didn't test for.

7 There are two expert witness doctors in  
8 this case. Who are you going to believe?  
9 Dr. Dickson, the state's expert, or Dr. Paul,  
10 the doc -- the doctor that the defense hired?

11 Dr. Dickson, who works in an emergency  
12 room in Yuma, which is both a farming community,  
13 where organophosphate compounds are used in  
14 pesticides, and Yuma, which is just probably about  
15 the hottest place in the state of Arizona --  
16 Dr. Dickson, who treats about 20 live patients  
17 every year, he said, with heat exhaustion or heat  
18 stroke and who also treats live patients suffering  
19 from organophosphate poisoning, who has treated  
20 actually some border agents who were directly  
21 sprayed by some crop dusters, who didn't die by the  
22 way, and who treats patients with hypercapnia or  
23 carbon dioxide poisoning.

24 Dr. Dickson, who is the emergency  
25 management systems director for Yuma County and who

1 teaches the EMS, the firefighters, the border  
2 control agents, and doctors for the military base  
3 about heat-related illness and heat stroke on a  
4 regular basis.

5 Or are you going to believe Dr. Paul, the  
6 defense doctor out of New Mexico, who conveniently  
7 says he cannot rule out organophosphates because  
8 the signs and symptoms are consistent and  
9 unfortunately no testing was done. Dr. Paul, who  
10 has never treated a live patient with  
11 organophosphate poisoning, who has never performed  
12 an autopsy on a patient with organophosphate  
13 poisoning, whose colleagues have never performed an  
14 autopsy on a patient with organophosphate  
15 poisoning, and who has done only 10 to 12 autopsies  
16 on patients with heat stroke.

17 Dr. Paul, who was asked point-blank by  
18 Mr. Hughes, what is the lethal dose of an  
19 organophosphate that would be needed in this case?  
20 What's the lethal dose of an organophosphate? What  
21 would it be? Do you remember Dr. Paul's answer?  
22 He has not done any research in that area, and that  
23 would be beyond his area of expertise. Well, he  
24 apparently just stopped his research without  
25 testing whether this conclusion of organophosphates

1 is even plausible.

2 Dr. Paul, who admits he is not aware of  
3 any case where sitting on a pesticide with an  
4 organophosphate compound caused death but, again,  
5 conveniently told you that's outside of his area of  
6 expertise. Dr. Paul, who has no explanation by the  
7 way, why some people face down got sick and others  
8 did not. Why some people face up got sick and  
9 others do not.

10 The theory that Dr. Paul is suggesting to  
11 you is that somehow somebody came in, prayed --  
12 sprayed pesticides in that soil, and the  
13 participants came in -- he said they would have to  
14 directly absorb it. And so those lying down  
15 apparently right in a patch somehow got sick.

16 The problem with that theory is that  
17 there is no pattern of who got sick and who did  
18 not. In other words, you have Mark Rock face down  
19 with his face in that soil, and he did not get  
20 sick. You have Dawn Gordon right beside him face  
21 up, and she does not get sick. Kirby Brown, who is  
22 face up, face up until they pushed her to her side,  
23 who gets sick. And James Shore, right next to  
24 her -- the testimony was that he was close to the  
25 pit in the beginning face down but then moved back.

1 And then from that point forward he was either on  
2 his side or he was up tending, helping others.

3 You have Liz Neuman over here. The  
4 testimony was that she leaned back on the legs of  
5 Laura Tucker and Laurie Gennari, both faced each  
6 other, kind of crossed their knees, and Liz Neuman  
7 leaned back on them.

8 We have Sidney Spencer, who was right  
9 there. The testimony was from Dawn Gordon that she  
10 noticed that when Sidney was being pulled out, that  
11 her chin was on her chest, passed out. Stephen  
12 Ray, down here. His testimony was that he was  
13 covering his mouth and his knows with his hand and  
14 then later with his shirt. Beverly Bunn, who was  
15 on the back, knees in the air, from the second  
16 round on, not sick.

17 Sean Ronan. He's the third person who  
18 was pulled out when the ceremony was over and air  
19 evaced up to Flagstaff. Sean told you he was  
20 sitting and then he was laying on his back until  
21 the fifth round, and then he moved to his stomach.  
22 And Linda Andresano, who passed out inside --  
23 again, the nurse from Tucson -- passed out inside  
24 and was dragged out after the ceremony was over.  
25 Testimony from several witnesses was that Linda was

1 in the back leaning -- sitting up, leaning, kind of  
2 crumpled against the side of the tent.

3 Melissa Phillips. She was in this area,  
4 face down, not sick. Laura Tucker, on her side,  
5 not sick. And then Kim Brinkley face down over in  
6 this area.

7 So you see, no pattern. No pattern as to  
8 who got sick and who -- who did not.

9 On page 2 of your jury instruction talks  
10 in paragraph D about expert witnesses. And the  
11 second paragraph under D says, expert opinion  
12 testimony should be judged just as any other  
13 testimony. You are not bound by it. You may  
14 accept or reject it in whole or in part. And you  
15 should give it as much credibility and weight as  
16 you think it deserves considering the witness's  
17 qualifications and experience, the reasons given  
18 for the opinions, and all the other evidence in  
19 this case.

20 I suggest to you that the expert opinion  
21 of Dr. Paul has no credibility whatsoever.

22 Here's a quick review of the medical  
23 evidence in this case: Dr. Dickson, who reviewed  
24 all of the medical records and Dr. Paul's report  
25 and examined all other possible causes of death,

1 such as the toxins and the organophosphates -- he  
2 unequivocally testified that all three victims died  
3 of heat stroke and did not die of organophosphate  
4 poisoning.

5 Dr. Dickson said, sure. If you look at  
6 the signs and symptoms in isolation, you can make  
7 them fit into lots of toxidromes. But if you look  
8 at them all together, it is a clear case of heat  
9 stroke.

10 Dr. Paul, the defense expert -- he  
11 actually agreed that all the patients suffered from  
12 heat exhaustion. Remember how he testified? Well,  
13 he is not saying the victims died of  
14 organophosphate poisoning, just that all the  
15 victims -- that they all had signs and symptoms  
16 consistent with organophosphates, and he cannot  
17 rule it out, again, because no testing was done.

18 However, he conceded that if he had a  
19 reliable core temperature of 105 degrees  
20 Fahrenheit, he would have to conclude that the  
21 victims died of heat stroke.

22 About that core temperature. Dr. Paul  
23 testified that your body will cool 11 degrees in an  
24 hour with aggressive cooling, such as an ice bath.  
25 He refused -- when Mr. Hughes tried to pin him



1 down, he refused to talk about how much cooling you  
2 would do at the ambient air temperature. For  
3 example, 70 degrees in Sedona. He couldn't tell  
4 you how -- how fast the body would cool down.

5 But Dr. Dickson testified that at 70  
6 degrees your body will cool nicely, about 2 degrees  
7 every 10 minutes or about 12 degrees in an hour.

8 Dr. Dickson said toxidromes -- remember  
9 those mnemonics that the defense kept running the  
10 doctors through? Dr. Dickson said, yes. Those are  
11 helpful because if the signs and symptoms fit in a  
12 box, it will point you in a certain direction. But  
13 you don't just pick and choose a few of the signs  
14 and symptoms from the toxidrome, like Dr. Paul and  
15 the defense has done. You have to make them all  
16 fit. The mnemonics are useful if everything fits.  
17 Otherwise it's just random signs and symptoms.

18 The defense wants you to look at a few  
19 signs and symptoms randomly or in isolation and  
20 conclude that there is reasonable doubt in this  
21 case. It doesn't work that way. You must look at  
22 the big picture. Look at the big picture, as  
23 Dr. Dickson has done, and you will see that some of  
24 the patients showed this cholinergic symptoms and  
25 others showed anticholinergic symptoms.

1 In fact, Dr. Cutshall, who treated Liz  
2 Neuman, testified, well, she had signs and symptoms  
3 consistent with both cholinergic and  
4 anticholinergic. In other words, her signs and  
5 symptoms and the signs and symptoms of all the  
6 other patients, none of them fit neatly in that box  
7 to point you toward organophosphate poisoning.

8 I want you to take a look at these charts  
9 that Dr. Dickson made -- Dr. Paul, the defense  
10 doctor, made for you when he was testifying under  
11 cross-examination by Mr. Hughes. Mr. Hughes had  
12 asked him, well, come to the easel and write for me  
13 what are the symptoms that support your opinion.  
14 And what's so glaring about this is that Dr. Paul  
15 wrote down only the signs and symptoms that support  
16 his opinion and left out some very important ones.

17 For example, Dr. Paul admitted during his  
18 cross-examination that the position paper for the  
19 National Association of Medical Examiners, which is  
20 his professional association, that the official  
21 position paper that addresses determining the  
22 causes for heat-related deaths include as one of  
23 the diagnostic criteria, what? Look at the  
24 circumstances. Yet never once in all these lists,  
25 whether it's Liz Neuman, Kirby Brown, James Shore,

1 Tess Wong, or Stephen Ray, never once did Dr. Paul  
2 write down the circumstances surrounding the  
3 victims' death. That is so glaring. That is so  
4 glaring.

5 That's what the defense wants you to  
6 ignore. They want you to ignore what is right in  
7 front of your eyes as the cause of death. What is  
8 the environment that the victims were found in  
9 before falling into serious distress and dying?  
10 It's that superheated, tight, enclosed space for  
11 over two hours where they were subjected  
12 intentionally by Mr. Ray to searing heat and  
13 searing humidity.

14 Here's the other interesting thing about  
15 the charts that Dr. Paul created. Whether it's for  
16 Liz Neuman -- see how he wrote dehydration as one  
17 of the signs and symptoms for Liz? For Sidney  
18 Spencer, again dehydration. No heated environment,  
19 nothing about the circumstances where they were  
20 found.

21 For Tess Wong, same thing. He writes  
22 dehydration, mental status change, which, of  
23 course, can occur with either. No mention of this  
24 superheated, tight, enclosed space.

25 What's interesting is that for everybody

1 Dr. Paul put up there dehydration as a crucial  
2 finding for him as to why this was not heat stroke.  
3 Here's the problem: Dr. Paul's position is in  
4 conflict with his own Association. Again, that  
5 position paper that he was cross-examined on, the  
6 position paper that talks about, what is the  
7 diagnostic criteria for examiners to find heat  
8 stroke -- that position paper does not say that  
9 dehydration is a diagnostic criteria.

10 All of the doctors disagree with Dr. Paul  
11 on that point, as well as his own association of  
12 medical examiners. The fact of the matter is,  
13 according to Dr. Dickson and that position paper,  
14 dehydration is not a necessary component of heat  
15 stroke.

16 Dr. Mosley testified really what we all  
17 know, that a well-hydrated person can die, for  
18 example, in a hot car in Phoenix of heat stroke.  
19 Heat stroke is not a criteria. It is not a  
20 diagnostic criteria. And when Mr. Hughes said to  
21 Dr. Paul on the stand, show me the literature where  
22 it says that, Dr. Paul couldn't find it.

23 Dr. Paul wants you to believe that if it  
24 is exertional heat stroke, then dehydration is not  
25 a necessary criteria. But if it is nonexertional

1 heat stroke, in other words, heat stroke where  
2 you're sitting inside a hot, crowded tent, then you  
3 have to have dehydration. His profession does not  
4 support that.

5 Let me go back to -- if I can. Remember  
6 when Mr. Li made his opening statement to you? And  
7 remember when he on the easel wrote those two  
8 things? Remember what he told you, that to have  
9 heat stroke you have to have an elevated  
10 temperature and you have to have dehydration? He  
11 said the victims didn't have either one or the  
12 state can't prove it. He crossed them out and  
13 said, therefore, reasonable doubt.

14 What you've learned through the course of  
15 this trial is that neither one is true. In fact,  
16 Dr. Paul, the defense own expert, admitted that in  
17 the 10 to 12 autopsies that he has done, he's never  
18 had that temperature. And the reason is because  
19 you often don't get it. Unless you get to that  
20 patient right away, you're not going to have that  
21 elevated temperature.

22 The autopsies that Dr. Paul had done, he  
23 described them as the border crossers where he  
24 found they had skeletal remains and admitted he  
25 didn't have that core temperature. He admitted in

1 order to have a diagnosis of heat stroke, you don't  
2 have to have this documented elevated temperature.  
3 So that's not true.

4 The second thing that Mr. Li wrote is  
5 that you have to have dehydration to have heat  
6 stroke. And as you just heard, that's not true  
7 either. The only doctor who says that you have to  
8 have dehydration for nonexertional heat stroke is  
9 the defense's own doctor, Dr. Paul. Not documented  
10 anywhere. It's not in the position paper for the  
11 medical examiners, and none of the other doctors  
12 agree that that is, in fact, true.

13 I want you to take a look at these  
14 mnemonics, the SLUDGEM that the defense created on  
15 these exhibits, the DUMBELLS. Remember how they  
16 ran all the doctors through those mnemonics? Well,  
17 what are those mnemonics about?

18 If you look at each one of those, think  
19 about what is going on with this toxidrome.  
20 Salivation; lacrimation, which is the tearing;  
21 urination; defecation; GI upset; emesis; which is  
22 the sweating, and then the miosis down here by  
23 itself. All of these signs and symptoms are about  
24 fluids pouring out of your body. And that's what  
25 makes, according to Dr. Dickson, organophosphate

1 poisoning diagnosable. It's fluids pouring from  
2 your body.

3 It's not mistaken for heat stroke. And  
4 as Dr. Dickson said, it is about fluids pouring  
5 from every possible orifice. From the eyes, the  
6 mouth, the nose, excessive salivation until your  
7 lungs fill with fluids and you drown in your own  
8 fluids. That is not -- according to Dr. Dickson,  
9 you don't mix that with heat stroke. Two  
10 completely different symptoms in your patients.

11 Dr. Dickson, the only doctor who has  
12 treated patients with organophosphate poisoning,  
13 testified that, yes, while a few of the symptoms  
14 for heat stroke may overlap with symptoms of  
15 organophosphate poisoning, the two illnesses are  
16 not mistaken. And, again, you don't just pick and  
17 choose a couple that help support your case. You  
18 have all of them, they fit in a box, and that's why  
19 a toxidrome is useful.

20 Death due to organophosphate poisoning  
21 occurs when the patient drowns in their own saliva,  
22 this excessive salivation. Not a single patient in  
23 this case was diagnosed by a single doctor with  
24 organophosphate poisoning.

25 Those -- these few references that the

1 defense found for you in records here and there --  
2 little foaming, some saliva -- those are  
3 overlapping symptoms. Not a single patient was  
4 diagnosed with organophosphate poisoning. Not a  
5 single patient presented with all of those signs  
6 and symptoms that would show you that somebody had  
7 organophosphate poisoning.

8 And, again, use your common sense. Many  
9 witnesses -- many patients who fell ill and  
10 recovered laid on their backs during the event. If  
11 they were on their backs and they were suffering  
12 from organophosphate poisoning, they would have  
13 drowned. Many patients were strapped to gurneys on  
14 their backs for transportation. They would have  
15 drowned, according to Dr. Dickson, by being  
16 strapped on their backs to gurneys.

17 The three victims were strapped to  
18 gurneys on their backs, and not a single patient  
19 subsequently drowned in their own saliva. Even  
20 Dr. Paul, the defense expert, admitted not a single  
21 patient, including the three victims, had excessive  
22 salivation and not a single victim died from  
23 drowning in their own spit.

24 None of these doctors -- not Dr. Paul,  
25 Dr. Mosley, Dr. Cutshall, Dr. Lyon, or Dickson --

1 has ever seen a patient die of organophosphate  
2 poisoning. Yet, the defense wants you to conclude  
3 that somehow mysteriously in this case that's what  
4 happened.

5 The defense has attacked the  
6 investigation in this case, but again, rely on your  
7 common sense. Dr. Dickson did that. Follow the  
8 evidence.

9 I want to play this clip for you --  
10 remember the clip, the dining room that night  
11 and -- and somebody, probably a paramedic, who  
12 knows, comes in, and in the background there's this  
13 reference to organophosphate poisoning. I want you  
14 to listen to that again. And listen to what he  
15 says about, we don't really know. Maybe carbon  
16 monoxide with some maybe organophosphates mixed in.  
17 But listen to it.

18 (Audio played.)

19 MS. POLK: So that's the evidence that the  
20 defense has built this house of cards around  
21 wanting you to believe that somehow  
22 organophosphates killed the three victims. There's  
23 been no evidence whatsoever of the use of any  
24 product at Angel Valley with organophosphates in  
25 it. And the state has proven beyond a reasonable

1 doubt that the Hamiltons used, in fact, very few  
2 chemicals on their property and used no chemicals  
3 containing organophosphates.

4 There's simply no evidence of any unknown  
5 toxin on that property at all. No pressure-treated  
6 wood, no pesticide, no mysterious rat poison, and  
7 no organophosphates that killed the three victims.

8 Use your common sense again. I don't  
9 know about you, but when I smell pesticides, I  
10 smell them. The evidence in this case has been  
11 from witness after witness that nobody smelled  
12 anything unusual in that sweat lodge. Debbie  
13 Mercer said she never smelled any odors on the  
14 coverings when she helped build the sweat lodge and  
15 she never saw any evidence of use of pesticides or  
16 other chemicals at Angel Valley.

17 Sergeant Barbaro on the scene that  
18 night -- remember, he poked his head in. He told  
19 you he didn't smell anything unusual.  
20 Detective Diskin the next day told you he didn't  
21 smell any odors. And Dr. Paul told you that  
22 patients -- some patients with organophosphate  
23 poisoning will have a very distinct garlic-like  
24 smell. Again, not present in this case at all.

25 The defense has taken one symptom from

1 that toxidrome, the myosis, and built a house of  
2 cards hoping that you won't blow it down.

3 To put the issue to rest of some other  
4 cause of death, I'm going to run you through all  
5 the other possibilities that the defense raised  
6 during the course of this trial. Rat poison, Just  
7 One Bite, JT Eaton, One Bite II, d-CON.

8 Dr. Dickson testified -- first of all,  
9 none of these products contain organophosphates.  
10 And all of them cause the rat to die by causing it  
11 to bleed to death. There's been no evidence of any  
12 patient in this case bleeding.

13 AMDRO ant killer. Dr. Dickson testified  
14 it does not contain organophosphates, that it  
15 causes skin irritation, moderate eye irritation,  
16 and that he would induce vomiting if somebody  
17 ingested it.

18 You heard from Fawn Foster and Michael  
19 Hamilton that that AMDRO was not even used at Angel  
20 Valley until June of 2010, eight months after  
21 Mr. Ray's sweat lodge. And in ten years at his  
22 hospital, Dr. Dickson has never seen a patient who  
23 ingested AMDRO.

24 The DPS crime lab report, the rocks, the  
25 tarps, the D logs, and the pole from that sweat

1 lodge structure were all seized and sampled and  
2 sent off to the DPS lab.

3 Dr. Paul testified that the toxin that  
4 supposedly caused the deaths could not have been  
5 airborne. Remember he said that? And that  
6 exposure would have had to have been through direct  
7 contact in the sweat lodge. So that effectively  
8 eliminates the rocks, the wood, the coverings of  
9 the sweat lodge and the poles.

10 But in any event, when the lab heated the  
11 items to 50 degrees Celsius, which was about 122  
12 Fahrenheit, they found nothing in the rocks or the  
13 poles, and they found trace amounts of this 2-EH,  
14 the 2-ethyl-1-hexonal, and the 2-ethyl acetate in  
15 one tarp piece but no volatiles in the other  
16 sample -- the other sample.

17 This 2-EH, Dawn Sy and Dr. Dickson both  
18 testified, is a solvent to help form phosphorous.  
19 So, of course, it was found in the sample of the  
20 coverings of the sweat lodge that contained vinyl  
21 when that sample was heated, by the way for eight  
22 hours, to 122 degrees.

23 Nonetheless, the defense wants you to  
24 ignore the obvious, ignore your common sense, and  
25 believe that that 2-EH came not from the vinyl

1 materials, but from pesticides that could have been  
2 in the tent but apparently were only sprayed in the  
3 area where those who fell ill lay.

4 Again, use your common sense. Does 2-EH  
5 come from the plastic tarps or does it somehow come  
6 from pesticides supposedly sprayed on the dirt?  
7 This theory requires you to completely suspend your  
8 common sense and ignore the evidence.

9 Again, no one smelled anything. There's  
10 no pattern among those who fell ill, face up or  
11 face down. And your common sense tells you that we  
12 all get exposed to chemicals, to pesticides, on a  
13 regular basis without anyone dying.

14 Finally, both Dawn Sy and Dr. Dickson  
15 also testified that the 2-EH is even added to food  
16 as a flavor enhancer.

17 The alpha-terpineol that was found in  
18 that cedar log from the wood pile, Dawn Sy  
19 testified its presence -- it's common to find the  
20 terpenes in woods. So she wasn't surprised. And  
21 that it's commonly found in pine oils, is  
22 harmful -- it is harmful if swallowed, but the logs  
23 never went inside the sweat lodge, and they were  
24 burned at the scene.

25 Dr. Dickson said that if there were toxic

1 substance in the wood smoke, you would expect those  
2 exposed to that fire to suffer the most effects.  
3 And you know from the testimony of Ted Mercer and  
4 the others outside that none of them suffered any  
5 ill effects from the smoke from that fire.

6 All of those samples were then heated to  
7 203 degrees, which is just short of boiling, for  
8 eight hours, and various volatiles were found. But  
9 no way -- no way did the air inside that sweat  
10 lodge get close to boiling.

11 So that's it for the chemicals the  
12 defense has tried to suggest might have killed the  
13 victims. But there is even more you can look at  
14 that proves beyond a reasonable doubt that the  
15 victims died from the extreme heat.

16 You have heard evidence that many sweat  
17 lodge ceremonies have been conducted in that same  
18 sweat lodge at other times and that the only time  
19 participants experienced significant distress is  
20 when the defendant runs the event. And that is  
21 proof that some unknown cause, such as toxins, did  
22 not cause their deaths.

23 You have heard evidence that in 2007 and  
24 in 2008 Mr. Ray conducted ceremonies there and  
25 people got sick. In 2007 it was a different

1 structure, and people got sick. In 2008 it was the  
2 same structure that he used in 2009, and people got  
3 sick. That is further evidence that it is  
4 Mr. Ray's conduct, Mr. Ray's conduct, and not some  
5 unknown toxin that caused the victims to die.

6 THE COURT: Excuse me, Ms. Polk. Could we  
7 take the afternoon recess? It's been 90 minutes.

8 Ladies and gentlemen, we will take an  
9 afternoon recess. Remember all aspects of the  
10 admonition still apply. You cannot discuss the  
11 case among yourselves or anyone until the case is  
12 actually presented to you when the closing  
13 arguments are completed.

14 Take about a 15-minute break.  
15 (Proceedings continued outside presence  
16 of jury.)

17 THE COURT: The record will show the presence  
18 of Mr. Ray and the attorneys.

19 Ms. Rybar indicated that somebody wished  
20 to state a legal --

21 MR. LI: Judge, quickly, just a -- I don't  
22 want to disrespect Ms. Polk and interrupt her  
23 during her closing arguments, but there are four  
24 matters I'd like to bring up with this Court as  
25 objections.

1 The first is that there are several times  
2 when Ms. Polk has been vouching for witnesses,  
3 specifically the phrase "we know that." That is --  
4 that is just flat-out not permissible argument,  
5 particularly when it's being done by a government  
6 lawyer. That is vouching. That is actually  
7 grounds for a mistrial.

8 Second is the continual burden shifting.  
9 Ms. Polk started off by arguing the defense has put  
10 us in the position of having to prove a negative.  
11 That was actually probably a quote from -- from  
12 Ms. -- Ms. Polk's argument. It is not the defense  
13 that puts the prosecution in -- in the position of  
14 having to prove the nonexistence of a superseding  
15 cause. That's actually just the law that puts the  
16 prosecution in that position. And so placing that  
17 burden on us is incorrect.

18 Third, the -- just before the break -- or  
19 I apologize, not before the break. There was a  
20 reference to JRI and -- and how Mr. Ray was  
21 responsible for everything at JRI. That is exactly  
22 the vicarious liability instruction that we were  
23 looking for. It is improper argument.

24 I said there were four things. I think  
25 there's actually five. There's another one where

1 Ms. Polk mentioned the fact that the defense had  
2 not alerted them, the prosecution, to the  
3 organophosphate issue until January 2011. This  
4 court when we -- when that exact line of  
5 questioning was taking place, contemporaneously  
6 instructed the jury that that's not required of the  
7 defense and that the defense is specifically not  
8 required to do that and that the burden remains on  
9 the prosecution throughout.

10 The last issue is, I think, there --  
11 there is a 404(b) violation in that Ms. Polk argued  
12 that the 2007, 2008 events were proof that  
13 Mr. Ray's conduct caused the -- the deaths. And  
14 this is, again, the whole pattern argument, Your  
15 Honor.

16 And so we just want to note that for the  
17 record. I don't want to interrupt Ms. Polk. I --  
18 I want to respect her ability to make the argument.  
19 But we have to make this record. And if this is  
20 the -- this might be the best way to do it, and  
21 this is how we'd like to do it, unless the Court is  
22 going to admonish the prosecution.

23 THE COURT: There's actually one other thing  
24 that I was concerned with, Ms. Polk and, Mr. Li.  
25 And I believe that the audio played from Kirby

1 Brown was argued for a purpose that was not  
2 permitted, but that was contrary to the special  
3 instruction. And I noted that as well along with  
4 these others. I was making notes as I went  
5 through.

6 Ms. Polk.

7 MR. LI: And, Your Honor, I'm sorry.  
8 There's --

9 THE COURT: Well, I want Ms. Polk to be able  
10 to address anything that you believe.

11 MR. LI: Well, then I'm going to add one more,  
12 which is there is a continual refrain, the  
13 defendant wants you to believe "X." We are walking  
14 right up to what in -- in California is called  
15 "Griffen era." I'm not certain what the case is  
16 in Arizona. But it is the Griffen era. We're  
17 walking right up to it. And this also would be  
18 grounds for mistrial.

19 THE COURT: Ms. Polk.

20 MS. POLK: Your Honor, if there are specific  
21 areas you'd like me to address now, I will. What I  
22 would request is that I be allowed to finish.  
23 There have been some inadvertent "we know that." I  
24 don't intend to say that. But if there's areas of  
25 concern you'd like me to address, I can.

1 But what I would request is that I be  
2 allowed to finish. They've made the record and  
3 that I could address the concerns at a later date.  
4 We're going to eat up --

5 THE COURT: All right. I note these concerns  
6 and -- and if you think there's not a problem, then  
7 I want to hear your -- your side of it. And if you  
8 think that was the only possible issue had to do  
9 with an indication of possible vouching, the  
10 defendant wants you to believe, making that kind of  
11 comment, can sound very close to what somebody  
12 might be saying or not saying.

13 MS. POLK: And, Your Honor, I'll correct that  
14 and say -- say the defense -- again, those are not  
15 intentional efforts at vouching.

16 THE COURT: And the evidence being admitted  
17 for particular purposes and staying within those  
18 purposes, I noted that concern, as well.

19 MS. POLK: And what I'd like to do is pull up  
20 that limiting instruction. My recollection was  
21 that it was introduced for that purpose to  
22 understand Kirby's state of mind as she entered the  
23 sweat lodge.

24 THE COURT: I thought I heard you also  
25 indicating that the facts remembered were --

1 exactly how many hours were spent and the suffering  
2 and that which --

3 MS. POLK: Your Honor --

4 THE COURT: -- is against -- against 803.

5 MS. POLK: And excuse me for interrupting, but  
6 there was testimony from other witnesses that Kirby  
7 lay there for five hours. That didn't come from  
8 the tape. And I argued the tape for that purpose,  
9 that that was her state of mind. But there's other  
10 witnesses who testified -- Jennifer Haley and  
11 others who testified how long it was that Kirby  
12 laid there.

13 THE COURT: I remember the bench conference  
14 with -- with Jennifer Haley. And there was a  
15 tendency there for her also on that to bring in  
16 hearsay. And the only thing I brought in was a  
17 sense impression type of thing about feeling a  
18 sense of accomplishment or something. That was the  
19 only thing that was supposed to come in on that.  
20 Because, once again, it's going to be another form  
21 of hearsay statement.

22 Anyway, I -- I think there are grounds  
23 for these and -- and direct that you acknowledge  
24 them. And you have.

25 MS. POLK: And I'd like to make a full record

1 at another time, Your Honor, when I have the  
2 opportunity to fully explore. But my preference is  
3 to be able to bring the jury back in and use the  
4 time that I have left.

5 THE COURT: Mr. Li.

6 MR. LI: Your Honor, we would love for the --  
7 the prosecutor to be able to finish her closing  
8 argument. But we think that these are errors and  
9 that they need -- the jurors need to be instructed.

10 Right now the burden has been shifted,  
11 one. Two, there -- there -- evidence has been used  
12 for improper purposes or for purposes that were not  
13 permitted by the Court. And three, there was  
14 vouching. Any of those grounds would -- would  
15 merit mistrial.

16 Four, there was a discussion about the  
17 vicarious liability, which is exactly why we were  
18 asking for that instruction. The Griffin era or --  
19 Your Honor, and so as a consequence, it's not  
20 simply enough to just -- you know -- let the  
21 prosecutor continue on and then we'll figure it  
22 out. I mean, there's a jury in the box that has  
23 been told by the prosecutor a number of things  
24 which are improper.

25 MS. POLK: And, Your Honor, again, I am -- I

1 am arguing the evidence that was admitted at trial.  
2 The defense requested, and the Court gave over the  
3 State's objection, the Willits instruction on lost,  
4 destroyed, or unpreserved evidence. And that  
5 instruction to the jury says, if you find that the  
6 state has lost, destroyed, or failed to preserve  
7 evidence whose contents or quality are important to  
8 the issues in the case, you should weigh the  
9 explanation, if any, given for the loss or  
10 unavailability of the evidence.

11 That instruction puts the state in a  
12 position of explaining what I explained to the  
13 jury. All of that information about when it was  
14 that the state learned about this defense came out  
15 during trial testimony. This -- this instruction  
16 specifically says to the jury that they can weigh  
17 the explanation, if any, given for the loss. And  
18 that is what I was arguing to them.

19 THE COURT: Part of the explanation is is  
20 because the defense didn't tell us in time or  
21 something, that's -- that's burden shifting.  
22 That's burden shifting.

23 What I'd suggest I would do at this point  
24 is instruct that the state always has the burden of  
25 proof and that instructions -- special instructions

1 I've given throughout the trial in the use of  
2 evidence have to be -- have to control the  
3 consideration of the evidence.

4 And rather than go in and make something  
5 worse by just some verbal attempt, if there is a  
6 written instruction that can be presented, I -- I  
7 would like that. That can be done.

8 But these are -- these are concerns, as  
9 I've said.

10 So I would -- that's something I would do  
11 verbally at this time, Mr. Li, with regard to  
12 burden shifting and the use of evidence only in  
13 accordance with a special instruction.

14 MR. LI: Your Honor, I'm just conferring with  
15 my colleagues here. Several things. One, this  
16 is a -- you know -- listen. I want this case to go  
17 to verdict. We've been here for four months. So  
18 we very much share the state's interest in pursuing  
19 this trial to its completion.

20 That said, these are violations of a  
21 constitutional level, and we're not waiving our  
22 objections and our belief that they are all grounds  
23 for mistrial.

24 THE COURT: Are you -- are you asking for a  
25 mistrial right now?

1 MR. LI: Yes, Your Honor. These are -- these  
2 are purposeful, intentional violations of the  
3 rules. And -- and we filed them -- the motion for  
4 admonitions specifically to put the prosecution on  
5 notice as to what we believe is not proper based on  
6 all of the things that we've seen, all of the  
7 arguments we've seen.

8 We understand that this is for the  
9 record, Your Honor. But we intentionally filed  
10 that motion to put the -- that state on notice as  
11 to what -- what arguments are permissible and which  
12 ones are not. And this Court has seen that  
13 briefing, as has the state. And so our position is  
14 that this is intentional.

15 The second thing is that we would ask --  
16 we -- you know -- to the extent that the Court is  
17 going to deny that motion, we would ask that we --  
18 either the Court reread the instruction that was  
19 given contemporaneously when the state originally  
20 burden shifted and perhaps orally additionally  
21 instruct this jury that it's always the  
22 prosecution's burden, that the defense doesn't --  
23 doesn't put the prosecution in any position. It's  
24 actually the law that puts them in the position.

25 And then, thirdly, that we be allowed

1 to -- you know -- digest this and -- and come up  
2 with additional instructions relating to what we  
3 have seen so far in this argument and -- and  
4 present them to this court either tonight or  
5 tomorrow morning.

6 THE COURT: Do you have the written  
7 instruction that was provided to --

8 MR. LI: I don't have it.

9 THE COURT: With regard to Ms. Brown?

10 MR. LI: We can go find it. Yes.

11 THE COURT: Ms. Polk, if you would respond.  
12 There's now a pending motion.

13 MS. POLK: Your Honor, the state would request  
14 that the court deny this motion. There is no basis  
15 for it. There has been no intentional misconduct.  
16 And I don't agree that there -- I can't remember  
17 the -- the various issues, Your Honor. But I've  
18 explained the -- my comments on the clip that I  
19 played and that there was other testimony about the  
20 circumstances surrounding the Samurai Game and  
21 eyewitnesses who talked about how long Kirby lay  
22 there on the ground.

23 I do not believe that I made any  
24 arguments about that clip beyond what the limiting  
25 instruction was. I have explained for the Court my

1 position with respect to the Willits instruction  
2 and the state's ability to explain using testimony  
3 that came out at trial.

4 To the extent that the Court believes  
5 that there was a violation, the case law is clear  
6 that it can be cured with a limiting instruction.  
7 The state would not oppose that.

8 MR. LI: Your Honor, just for the record --  
9 again, I don't mean to disrespect Ms. Polk at all.  
10 But -- but I am -- I want to note that when she is  
11 making these arguments to this jury, she is reading  
12 from an outline. So these are -- I mean -- and  
13 they read -- many of them read exactly the same as  
14 some of the arguments made in the Rule 20 motion.

15 And so the point is that this is either  
16 intentional -- and, frankly, it doesn't even have  
17 to be intentional, Your Honor. And reckless also  
18 suffices. So it's one or the other. We're getting  
19 the instruction right now as to what the tape,  
20 vis-à-vis Ms. Brown was, and we'll have that before  
21 the Court shortly.

22 THE COURT: At this point I would read that,  
23 give a general verbal instruction, oral  
24 instruction, about burden shifting and how the  
25 burden always remains on the state. The defendant

1 does not have to produce any evidence of any kind,  
2 something like that. And if you have an additional  
3 suggestion, we can look at that.

4 But I'm denying the motion at this time.

5 Thank you.

6 (Recess.)

7 (Proceedings continued in the presence of  
8 jury.)

9 THE COURT: The record will show the presence  
10 of the defendant, Mr. Ray, the attorneys, and the  
11 jury.

12 Ladies and gentlemen, I'm going to give  
13 you a couple of verbal instructions. You've,  
14 essentially, heard these before. I'm going to  
15 summarize one of them. And it's this: I've  
16 instructed you that the state always has the burden  
17 of proof. There is no burden on the defendant to  
18 produce evidence of any kind.

19 The other instruction I gave at the time  
20 that Ms. Kirby Brown's statement was played, the  
21 recording was played. And I'm going to read that  
22 special instruction again. It would apply to its  
23 being played here during closings as well.

24 Ladies and gentlemen, the rules of  
25 evidence provide that some evidence can be

1 considered only for a limited purpose. You -- the  
2 way I said it that time, you are about to hear a  
3 statement. But you have recently heard a statement  
4 that was made and recorded outside the courtroom.  
5 And this statement is subject to the rule of  
6 hearsay and cannot be considered for its truth.

7 What that means is that we do not know  
8 whether the statement is true or whether the  
9 speaker really engaged in any of the actions she  
10 describes. For that reason, you may not consider  
11 the statement as evidence of what the speaker  
12 actually did or believed. The only purpose you may  
13 consider the evidence for is for what effect, if  
14 any, the statement may have had on a listener.

15 Ms. Polk, you may continue.

16 MS. POLK: Thank you, Your Honor.

17 I want to talk to you a little bit about  
18 this audio that you heard in its entirety during  
19 the course of this trial. On the night of  
20 October 8th, 2009, what is the crucial piece of  
21 evidence that the first responders who were  
22 scrambling to understand what had happened -- what  
23 didn't they have? And that night what is the  
24 crucial piece of evidence that the ER doctors who  
25 were looking at all possible causes -- what did

1 they not have? Over the next few days, what is the  
2 crucial piece of evidence that the doctors who were  
3 treating Liz Neuman did not have?

4 The answer is the defendant's own words  
5 describing how he was intentionally subjecting  
6 participants to extreme heat to achieve this  
7 altered mental state, telling them to ignore their  
8 body's signs and symptoms of distress, and the  
9 extreme nature of his event.

10 Sweat lodge ceremonies are not inherently  
11 a dangerous event, as you have heard.

12 Heat-endurance challenges where participants are  
13 actually told to ignore their body's signs and  
14 symptoms of heat illness are incredibly dangerous.

15 The first responders and the doctors that  
16 night and the next few days didn't have the  
17 evidence that you now have -- this audio, along  
18 with three and a half months of testimony in this  
19 case describing that searing heat and humidity and  
20 the defendant's challenge to them to ignore their  
21 own body's signs and symptoms of distress in the  
22 hopes of accomplishing a breakthrough.

23 First responders that night,  
24 Detective Diskin the next day responding to the  
25 scene, no one thought a facilitator of a sweat

1 lodge would ever tell participants to ignore their  
2 body's signs and symptoms of distress, the very  
3 warning signs that your body tells you, warns you,  
4 to get out of that heated environment.

5 It didn't occur to anyone that night that  
6 a facilitator of a sweat lodge would push the heat  
7 and the humidity to such an extreme, would ignore  
8 calls for help during his event from people in  
9 obvious distress, and would allow his participants  
10 to pass out inside that tent and just leave them  
11 there.

12 Just like the person who said, well,  
13 maybe it was carbon monoxide, organophosphates  
14 mixed in, no one that night could imagine someone  
15 deliberately using heat to achieve this mental --  
16 altered mental state, no one deliberately telling  
17 people to ignore their body's signs of distress.

18 Certainly the defendant himself that  
19 night, like a child caught with his hands in the  
20 cookie jar, immediately minimized what he had done.  
21 He told Sergeant Barbaro, who questioned him on the  
22 scene, that Ted was conducting the sweat lodge.  
23 And he told Sergeant Barbaro, well, there were  
24 about 40 people inside. That statement shows  
25 consciousness of guilt.

1 This information, the extreme nature of  
2 the event, that the doctors didn't have that night  
3 and that was not immediately known to  
4 Detective Diskin until he began interviewing the  
5 participants, is compelling evidence of the  
6 defendant's guilt.

7 Dr. Paul, who rendered an opinion for  
8 you, when asked by Mr. Hughes, told you he had  
9 never even heard this audio. Even though the  
10 environment where a person falls ill is one of the  
11 diagnostic criteria for heat stroke, Dr. Paul never  
12 heard this audio. This audio is evidence. It is  
13 compelling evidence that the defendant consciously  
14 disregarded a substantial and unjust --  
15 unjustifiable risk that his conduct would cause  
16 death. And it is compelling evidence that the  
17 defendant knew that the very people he was exposing  
18 to intense heat and potentially fatal conditions  
19 would ignore their own physical symptoms and signs  
20 of distress in others in reliance on the  
21 defendant's assurances and his direction to push  
22 through.

23 I'm not going to play this entire  
24 briefing for you. It's about 40 minutes. I urge  
25 you, when you go back to deliberate, to listen to

1 this entire briefing again. What I want to play  
2 for you are not isolated clips, but clips that you  
3 can now place into context, in the context of all  
4 the trial testimony and in the context of the  
5 events of the week.

6 Listen carefully to Mr. Ray's own words.  
7 You will hear proof Mr. Ray knows his heat event is  
8 extreme and beyond what any other sweat lodge  
9 facilitator does, that he knows the tent is covered  
10 in plastic tarps, that he knows the rocks -- that  
11 he knew the rocks were heated to a fevered pitch,  
12 that he consciously crammed participants in  
13 shoulder to shoulder, that he intended to introduce  
14 hellaciously hot heat and steam, that he told  
15 participants to ignore and push through their  
16 body's warning signs of distress, that he  
17 intentionally caused them to believe that ignoring  
18 their body's warning signs of distress and pushing  
19 through the pain and suffering was a good thing,  
20 that he told them they were not supposed to speak  
21 during the sweat lodge ceremony unless asked to  
22 speak by him, and that they were told they can't --  
23 they could not leave the tent during a round.

24 I'm going to play three audios, three  
25 clips. Again, when you go back to deliberate, I



1 urge you to listen to the whole thing.

2 (Audio played.)

3 MS. POLK: I can't play that third clip for  
4 you now, but maybe tomorrow. Doesn't look like  
5 I'll finish up today.

6 I do see, Your Honor, that it's  
7 5:00 o'clock.

8 THE COURT: Thank you, Ms. Polk.

9 We will go ahead and take the evening  
10 recess at this time.

11 Ladies and gentlemen, again, all aspects  
12 of the admonition continue to apply. You cannot  
13 attempt to communicate among yourselves about this  
14 case in any way. It's not been submitted to you at  
15 this point, so remember all the admonitions, and  
16 please continue to follow it.

17 And please be assembled at the regular  
18 time of 9:15 tomorrow morning.

19 Thank you. We are in recess.

20 (The proceedings concluded.)

21  
22  
23  
24  
25

1 STATE OF ARIZONA )  
2 COUNTY OF YAVAPAI ) ss. REPORTER'S CERTIFICATE

3

4 I, Mina G. Hunt, do hereby certify that I  
5 am a Certified Reporter within the State of Arizona  
6 and Certified Shorthand Reporter in California.

7 I further certify that these proceedings  
8 were taken in shorthand by me at the time and place  
9 herein set forth, and were thereafter reduced to  
10 typewritten form, and that the foregoing  
11 constitutes a true and correct transcript

12 I further certify that I am not related  
13 to, employed by, nor of counsel for any of the  
14 parties or attorneys herein, nor otherwise  
15 interested in the result of the within action

16 In witness whereof, I have affixed my  
17 signature this 11th day of July, 2011.

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MINA G HUNT, AZ CR No. 50619  
CA CSR No 8335

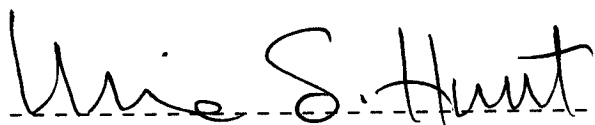
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25 CA CSR No. 8335